IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-250

AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, a District of Columbia Corporation; HAROLD STEELE, JOSEPH H. JOHNSTON, ROBERT W. BOGEN, and DR. FORREST F. EVANS of Nashville, Tennessee,
Appellants,

vs.

RAY BLANTON, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. ASHLEY, JR., Attorney General of the State of Tennessee; HARLAN MATTHEWS, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; WILLIAM SNODGRASS, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; DR. WAYNE BROWN, Vice-Chairman of the Tennessee Student Assistance Corporation; DR. NYLES C. AYRES, DR. EDWARD BOLING, MR. CLAUDE BOND, MR. FRANK BROGDEN, MR. JOSEPH COPELAND, DR. SAM INGRAM, MR. W. L. JONES, and DR. ROY NIX, Members of the Tennessee Student Assistance Corporation,
Appellees,

and

LORETTA P. BEARD, MARGARET B. BROOKS, GLORIA A. BROWN, BRENDA S. HUMFLEET, ARLILLIAN JONES, COLLEEN KEHLER, LAWRENCE H. NEWBELL, ADDIE MARIE REID, RAYMOND A. SHRIVER and JOHN W. SMYTHIA,
Intervenor-Appellees.

On Appeal from a Three-Judge United States District Court
for the Middle District of Tennessee

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Americans United for the Separation of Church and State, Harold Steele, Joseph H. Johnston, Robert W. Bogen,

and Dr. Forrest F. Evans, appeal from the final judgment of a Three-Judge United States District Court for the Middle District of Tennessee, Nashville Division, entered on May 19, 1977, dismissing their complaint on the merits, in accordance with the opinion of the court entered contemporaneously therewith, holding that the Tennessee Student Assistance Program for college students does not violate the Establishment Clause of the First Amendment. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal, that substantial federal questions are presented, and that plenary consideration of the questions, with briefs on the merits and oral argument, is necessary.

OPINION BELOW

The opinion filed by the three judge United States District Court for the Middle District of Tennessee is not reported and is reprinted at page A-17 of the Appendix of this Jurisdictional Statement. The Judgment entered by the District Court and the Notice of Appeal filed by appellants are reprinted at pages A-32 and A-34 of the Appendix, respectively.

JURISDICTION

This action, to enjoin on federal constitutional grounds the operation and enforcement of a Tennessee statute of statewide application, was filed June 23, 1976, pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202. Since the action was filed prior to the repeal of 28 U.S.C. §§ 2281 and 2282 and the amendment of § 2284, the case was properly heard pursuant to §§ 2281 and 2284 by a three-judge district court.[1] The judg-

[1] Section 7 of Pub. L. 94-381 provided that: This Act [amending 28 U.S.C. §2284 and repealing §§2281 and 2282] shall not apply to any action commenced on or before the date of enactment [Aug. 12, 1976]."

ment of the District Court, denying the injunctive relief by dismissing the complaint on the merits, was entered on May 19, 1977. Appellants filed notice of appeal with the District Court on June 17, 1977. The jurisdiction of this Court to review the judgment below on direct appeal is conferred by 28 U.S.C. § 1253.

STATUTE INVOLVED

The Tennessee Student Assistance Program for college students challenged by appellants was enacted as Tenn. Public Acts 1976, ch. 415, and is now codified as Tenn. Code Ann. §§ 49-5013 through 49-5019 (Volume 9, 1977 Replacement, pp. 460-62). The Act is reprinted at page A-1 of the Appendix. Regulations adopted to administer the Act are reprinted at page A-7 of the Appendix.

QUESTIONS PRESENTED

1. Whether the Tennessee Student Assistance Program violates the Establishment Clause by awarding non-repayable grants to defray the educationally-related expenses of students attending pervasively sectarian colleges?

2. Whether the Tennessee Student Assistance Program violates the Establishment Clause by awarding non-repayable grants to defray the educationally-related expenses of students attending colleges having dual but separable sectarian-secular functions, without restricting the grants so as to guarantee that the State supports only the secular aspects of their education?

3. Whether the Act creating the Tennessee Student Assistance Program is unconstitutional on its face, as well as in the above applications?

STATEMENT OF THE CASE

The Tennessee Student Assistance Program, enacted in 1976, provides financial aid to needy students to attend the college of their choice, but contains no restrictions insuring the secular use of the funds. The aid is in the form of non-repayable grants which must be used by the students to pay educationally-related expenses only.

The program is the successor to the Tennessee Tuition Grant Program declared unconstitutional in *Americans United v. Dunn*, 384 F. Supp. 714 (M.D. Tenn., 1974). In *Dunn* the District Court invalidated the tuition grants because the program contained no secular use restrictions and because the grants, though made to students through procedures very similar to the present program, were made payable directly to the colleges attended by the students. This Court noted probable jurisdiction, but before it could consider the appeal the Tennessee General Assembly amended the program by adding a secular use restriction. The Court vacated the judgment and remanded the case for reconsideration in light of the amendment. 421 U.S. 958 (1975). Before the District Court ruled on the amended program, the Tuition Grant Program was repealed in its entirety and replaced by the present Tennessee Student Assistance Program.

The pertinent details of the program were summarized accurately and succinctly by the District Court:

> The Tennessee Student Assistance Program, enacted as Chapter 415 of the Public Acts of 1976, now codified as T.C.A. §§ 49-5013-5021, has as its stated legislative purpose the following: ". . . providing needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee. . . ." In summary, the Act provides that state funds are to be made available to students directly, rather than to the college or university as under the former Tuition Grant Program. An award is to

be made solely on the basis of a student's financial need as measured by the student's or parents' ability to pay. A student receiving aid may attend in Tennessee a public college or university, a public vocational or technical institute, or a non-public college or university accredited by the Southern Association of Colleges and Schools. The maximum award a student may receive is set at the total of tuition and fees, or $1,200, whichever is less. The Act states specifically that no effort is to be made by state officials or by the administering organization, the Tennessee Student Assistance Corporation, to influence a student's selection of institutions.

The actual operation of the Act is revealed in the rules, regulations, and procedures of the Tennessee Student Assistance Corporation (hereinafter referred to as the "Corporation") and in the testimony presented at the hearing. A student desiring aid completes an application and a financial disclosure statement. The student is ranked in priority first on his or his parents' ability to pay for his education and then on the amount of the student's need. Once it is determined that a student is to receive an award, the Corporation verifies his enrollment with the institution and requests that a state warrant be issued in the student's name. Although the state warrant bears only the student's name and home address, usually all warrants for students attending a particular institution are mailed together to the institution's financial aid officer for distribution. As shown at the hearing, this method of disbursement has been adopted for two primary reasons: (1) the school term has usually begun by the time the warrants are prepared and the Corporation generally does not have the student's new school address; (2) this procedure provides a method by which the Corporation can monitor the use of the scholarship funds for "educationally related expenses only." With regard to the fiscal accountability function which was added

at the request of the state comptroller, Regulation 13 provides that, if a recipient has received credit during the registration process, he "should" give first priority to the liquidation of these debts before he uses his aid for other educationally related expenses. If he does not elect to liquidate any outstanding debts, he must provide evidence to the Corporation that he will use the funds solely for educationally related expenses before the warrant will be delivered to him. Testimony was presented at the hearing to show that, while tuition is often paid by the award, other educationally related expenses such as room rent, bus fare, clothing and health care expenses can be and have been paid with program funds, and that the formula adopted for determining the actual amount of a student's need takes into account such personal expenses. If the student should decide to transfer from one institution to another he may do so and keep his assistance, provided he notifies the Corporation and approval is given.

A-20-21.

The Tennessee Student Assistance Program is currently funded by a $750,000 appropriation from the General Assembly and a federal matching grant in the same amount. In February, 1977, private school students received 41% of the awards but 65% of the funds while public school students received 59% of the awards but only 35% of the funds. A-21-22.

The lower court found that some of the private schools whose students benefit from this program "are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization." A-22.

On May 19, 1977, the lower court held the Tennessee Student Assistance Program to be constitutional both on its face and as applied. On June 17, 1977, Appellants filed notice of appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Under the challenged program, Tennessee awards non-repayable grants to needy undergraduate students attending accredited public and private colleges and universities and public vocational and technical institutes; recipient students are required to spend the awards on "educationally related expenses only." Regulation 1640-1-1-.03(13) (A-13-14). The program contains no restrictions preventing students from receiving grants who attend pervasively sectarian schools or schools having a dual sectarian-secular function. The program also contains no restrictions preventing students at schools having dual sectarian-secular missions from using the grants for expenses related to the sectarian aspects of their education, nor any restrictions on how the schools may use the funds in those instances in which the funds are paid to the school by the students.

A substantial constitutional question is presented by Tennessee's award to students of grants to help defray the educationally-related expenses incurred in attending colleges having a dual sectarian-secular mission, under a program that does not insure that the subsidized aspect of the students' education is exclusively secular.

A. The Establishment Clause Requires That State Aid Programs to Students Attending Schools Having a Dual Sectarian-Secular Mission Must Be So Designed as to Guarantee That the State Subsidizes Only the Secular Aspects of the Students' Education.

On at least six separate occasions, the Court has given plenary consideration to the constitutionality of governmental aid programs to students (or their parents), as distinguished from programs of direct aid to the educational institutions themselves.

Everson v. Board of Education, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 45 USLW 4861 (U.S., June 24, 1977).

The most constant and firmly rooted doctrine of these "student aid" cases is the joint requirement that the programs 1) be made available to both public and private school students alike, so that no one religious group receives a special benefit, and 2) be restricted in such fashion as to guarantee that the State is supporting only the secular portions of the students' education.

In *Everson*, the Court upheld a system under which New Jersey reimbursed parents for the cost of sending their children to and from school, public or parochial, by public carrier. The Court carefully examined the program not only to ascertain that it was part of a general public welfare scheme but also to determine that the bus rides contained no sectarian content.

In *Allen*, the Court sustained a state law requiring that private as well as public school students be loaned textbooks. Again the Court scrutinized the program to satisfy itself that no special benefit was given to religious school students and that the textbooks were exclusively secular.

In *Nyquist*, the Court struck down a scheme of tuition reimbursements and tax credits to private elementary and secondary students because they did not meet either of the dual requirements. While the Court emphasized that one religious group was being singled out for a special benefit since only private school students, most of whom attended parochial schools, were eligible for the program, the Court also found that:

> The tuition grants here are subject to no . . . restrictions . . . to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.

413 US. at 783.

In *Sloan*, the Court invalidated a Pennsylvania tuition reimbursement program because in any important respect it was indistinguishable from the New York Acts considered in *Nyquist*.

In *Meek* the Court sustained a Pennsylvania statute providing for the lending of textbooks to private school students because the program "extend(s) to all school children" and the "record contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes." 421 U.S. at 360, 362. In striking down a program of auxiliary services provided directly to nonpublic students on the grounds that enforcement of the secular use restriction in the program would require excessive entanglement of the State with religion, the Court emphasized that Pennsylvania "must be certain" that the student aid does not advance the religious mission of the schools attended by the students. 421 U.S. at 370.

In *Wolman v. Walter*, 45 USLW 4861 (U.S., June 24, 1977), the Court upheld a secular textbook loan program because it "provides the same protections against abuse as were provided in the textbook programs under consideration in *Allen* and *Meek*." 45 USLW at 4863. The Court also upheld a program providing diagnostic speech, hearing, and psychological services directly to private school pupils. It did so because public school students also received the service and because "diagnostic services, unlike teaching and counselling, have little or no educational content" and diagnostic personnel have limited and objective contact with the students, thus virtually eliminating any opportunity "for the transmission of [the] sectarian views [that may] attend the relationship between teacher and student or . . . between counselor and student." 45 USLW at 4864-65.

Consequently diagnostic services did "not create an impermissible risk of the fostering of ideological views." *Id.* The Court sustained the expenditure of state funds for certain therapeutic, guidance and remedial services for students because both public and private school students received them and because they were provided to private school students by public employees on sites not physically or educationally identified with the functions of the non-public school. The religiously neutral sites assured that religious instruction would not be transmitted and religious beliefs would not be advanced. 45 USLW at 4865-66. The purchase and loan of ostensibly secular instructional materials and equipment to pupils or their parents was found to be unconstitutional since such material "inevitably flows in part in support of the religious role of the schools" in the case of students attending pervasively religious private schools, where the secular education is inextricably intertwined with the schools' religious mission.[2] 45 USLW at 4866.

Collectively, these cases demonstrate that even when a state aid program does not provide direct aid to the educational institutions—but is merely part of a general public welfare scheme of *student* assistance—the program must not "create an impermissible risk of the fostering of ideological views." *Wolman v. Walter, supra,* at 4867. To pass constitutional scrutiny under the "primary effect" test, the program must be restricted in such fashion that there is a guarantee that only secular education is being supported. Even restricting the student aid to secular services will not suffice if the services relate to the students' education and the school's educational and religious missions are pervasively intertwined.

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[2] The final program considered in *Wolman v. Walter* was a provision for funding field trip transportation to nonpublic and public pupils. This program was found, however, to be direct institutional and, not purely "student aid." 45 USLW at 4867.

B. The Challenged Program Impermissibly Advances Religion Because the Grants May Be Used to Finance the Religious Aspects of a Student's Education.

Under the Tennessee Student Assistance Program students receive non-repayable grants that must be spent to defray educationally related expenses. Regulation 1640-1-1-.03(13) promulgated by the Tennessee Student Assistance Corporation, which administers the grant program, provides:

> Recipients must use Assistance Awards for educationally related expenses only. A recipient to whom credit has been extended during the enrollment process should give first priority to the liquidation of that obligation before using the proceeds of the award to defray other educational expenses. Should the Assistance Award recipient not elect to liquidate debts incurred during the enrollment process, he must provide evidence satisfactory to the Tennessee Student Assistance Corporation that the Assistance Award will be used solely for educational expenses before payment of any portion of the Award will be made by the Corporation.

The Corporation interprets "educationally related expenses" to be tuition, mandatory fees, books, supplies, room and board, and personal expenses.[3]

The credit typically extended to students during the enrollment process is for tuition, mandatory fees, room and board, and textbooks.[4]

Checks made payable to the individual recipients at each school are in most cases sent in one package to the financial

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[3] Official Transcript of Proceedings (hereinafter, "Tr."), Testimony of Kenneth P. Barber, p. 29.

[4] *Id.* p. 23.

aid officer of the school for delivery to the students,[5] six to eight weeks after the beginning of the semester.[6] This method of delivery is used because the Corporation does not know the students' school addresses and because the financial aid officers' control over the distribution of the money helps assure that the purpose of the program is carried out.[7] The Corporation requests the financial aid officers to return the State check to the Corporation if the school has extended credit to the student during the enrollment process and the student wishes to apply the grant toward an expense other than that for which credit was extended.[8] The student is then required to satisfy the Corporation that the expense is related to his education.[9]

No student has requested to use his grant for any purpose other than liquidating debts incurred during his enrollment process, and no checks have been returned to the Corporation because of the refusal of a student to apply his grant toward credits extended by his school during enrollment.[10] The Executive Director of the Student Assistance Corporation testified he was aware of "a couple of instances" in which the grants were not used to pay tuition, the tuition having been paid in those cases with federal Basic Educational Opportunity Grants.[11]

It is not disputed that neither the Act, regulations promulgated thereunder, nor any administrative procedure of the Student Assistance Corporation prevents the State grants from

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[5] Tr., Testimony of Kenneth P. Barber, p. 20.

[6] Tr., Testimony of Howard Wall, p. 61.

[7] Tr., Testimony of Kenneth P. Barber, pp. 25-26.

[8] *Id.* at 30, plaintiffs' exhibit 53 (entered in the record at Tr., Testimony of Kenneth P. Barber at p. 37).

[9] *Id.*

[10] *Id.* at 21.

[11] *Id.* at 22.

being awarded to students attending pervasively sectarian colleges, from being used by such students to pay tuition, purchase sectarian textbooks and supplies or used to finance other religious aspects of their education.

After reviewing the evidence presented by appellants of the sectarian nature of three of the private colleges whose students are receiving grants, the District Court found that some of the schools "are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organizations." A-22.

The record is replete with illustrations of the overwhelming sectarianism of the three colleges with respect to which appellants offered evidence. A few examples of the evidence relating to David Lipscomb College will suffice to demonstrate the accuracy of the District Court's finding of fact.

The "supreme purpose" of David Lipscomb College is to teach the Bible as the revealed word of God.[12] The first object of the college is "[t]o provide the best in Christian liberal arts education under the direction of Christians in a distinctly Christian environment."[13] Other major objectives include "train[ing] future leaders in the Church,[14] and "hold[ing] up Christ as the example to follow in every field of activity. . . ."[15]

According to the By-Laws of the College, each member of the Board of Directors must be a member of the Church of

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[12] Tr., Testimony of Athens Clay Pullias, p. 107; Plaintiffs' exhibit 25, p. 35.

[13] Plaintiffs' exhibit 25, p. 32.

[14] *Id.* at p. 33.

[15] *Id.* at p. 34.

Christ in good standing,[16] and all the current directors meet this requirement.[17] The college requires that all its faculty members be active members of the Church of Christ.[18] A number of the faculty are Church of Christ ministers, including the Academic Dean.[19] Each faculty member is "solemnly and affirmatively committed by contract to support, in teaching and in personal life, the academic and religious policies of David Lipscomb College as interpreted and announced by the Board of Directors and/or the administration.[20] If faculty members advocated points of view differing from those of the college, they would not be retained,[21] even if they were tenured.[22] The reason for requiring faculty to hold specific religious points of view is that it "influences" their conduct and teaching.[23] Some faculty persons who were members of a particular Church of Christ with whose views the college administration disagreed were given the alternatives of dropping their membership in the church or giving up their jobs at the college; they resigned.[24]

Chapel attendance is compulsory for both faculty and students,[25] and are conducted for worship.[26] Further, every stu-

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[16] Tr., Testimony of Athens Clay Pullias, p. 117; Plaintiffs' exhibit 29, Art. II, Sec. 1.

[17] Tr., Testimony of Athens Clay Pullias, p. 117.

[18] Tr., Testimony of Mack Wayne Craig, p. 165; Plaintiffs' exhibit 27, p. 33.

[19] Tr., Testimony of Mack Wayne Craig, pp. 164-65.

[20] Plaintiffs' exhibit 26, p. 4.

[21] Tr., Testimony of Mack Wayne Craig, pp. 165 *et seq.*

[22] *Id.* at p. 168.

[23] *Id.* at pp. 166, 170.

[24] *Id.* at pp. 166-67.

[25] Plaintiffs' exhibit 27, pp. 27, 37; Plaintiffs' exhibit 25, p. 43.

[26] Tr., Testimony of Athens Clay Pullias, p. 109.

dent must take a Bible lesson daily.[27] Out of a total enrollment of 2154 students at David Lipscomb College in 1976, 1921 were members of the Church of Christ.[28]

Some secular courses at Lipscomb are influenced by Church of Christ doctrines. A former student testified that in her basic biology course students were taught to defend the "creationist" point of view on the origin of man and the instructor attempted to disprove the scientific theory of evolution.[29] Some translations in her course on the Greek language were based upon the religious beliefs of the college.[30]

One example of a text used at Lipscomb is entitled *I Believe Because—A Study of the Evidence Supporting Christian Faith,* written by Dr. Batsell Barrett Baxter, Chairman of the College's Bible Department. The back cover of this textbook states in part:

> "This is a book that will lead to faith, strengthen faith, and encourage believers to be more positive in their thinking and living. College, Seminar, and church school classes will use this book for its practical help and then return to it time and time again for the inspiration and challenge it offers."[31]

It was admitted that the school has a religious mission,[32] and that if a student entered David Lipscomb College as a Christian and left as an atheist one of the purposes of the

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[27] Plaintiffs' exhibit 25, p. 36.

[28] Tr., Testimony of Athens Clay Pullias, p. 117.

[29] Tr., Testimony of Patricia Morgan, pp. 146-149.

[30] *Id.* at pp. 157-159.

[31] Plaintiffs' exhibit 32.

[32] Tr., Testimony of Mack Wayne Craig, p. 169.

school would not have been achieved.[33] In response to a question from the trial judge, the President of the college admitted that the college attempts to make the religious influence in the school "pervasive."[34]

Whether the Establishment Clause permits Tennessee to help defray educational expenses of students attending such a college is a grave question.

Where a state grant must be spent on expenses related to a student's education, and when his education has a pervasive sectarian content, the practical effect of the grant is that the state is purchasing for the student certain aspects of his private school education that it could not lawfully give him in the public schools. What is of constitutional significance is not that the Act permits a sectarian school student to put his check into his own bank account and use it for off-campus housing, commuting expenses, or other secular activities, but that it permits him to use the state funds to pay his tuition, buy sectarian textbooks and supplies, or meet other expenses that relate to religious instruction or inculcation. At the very least an "impermissible risk of fostering religious views" is created by the program. Beyond that, however, the program presents more than the theoretical risk that religious views will be fostered, for it can hardly be denied on this record that many students do in fact use their state grants for tuition, sectarian textbooks, and other expenses directly related to the sectarian content of their education. The District Court found that the grants are "often" used to pay tuition (A-21). By financially supporting the religious aspects of the students' educational program at the school, the state is engaging in the main concerns against which the Establishment Clause was designed to protect: "sponsorship, financial support, and active involvement of the sover-

[33] *Id.* at p. 170-71.

[34] Tr., Testimony of Athens Clay Pullias, p. 102.

eign in religious activity." *Walz v. Tax Commission*, 396 U.S. 664, 668 (1970).

The exercise of whatever limited discretion the student has under the Program as to the particular educational expense for which he will use his grant does not mean that the grant receipts are no longer State funds if spent for tuition, religious textbooks, or other sectarian purposes. Such a view is wholly unsupported in the case law. Indeed in *Nyquist*, the Court expressly rejected the argument that a tuition reimbursement program was constitutional because the parents receiving them were free to spend the money in any manner. The Court found that this fact was of "no constitutional importance," and that the fact there was no coercion to use the funds at the school did not render the aid constitutional. 413 U.S. 756 at 786-87. Such discretion certainly cannot make the expenditures constitutional in those instances in which the discretion is exercised to spend the money to pay tuition or purchase sectarian textbooks, or other religious instructional materials.

Admittedly, each of the student aid cases relied upon by appellants involved programs for elementary and secondary students, while the program presently under challenge applies to college students. In *Nyquist*, the proponents of the tuition reimbursement and tax credit programs argued that invalidating them would necessarily doom certain programs of aid at the higher education level. The Court responded in a footnote:

> We need not decide whether the significantly religious character of the statutes' beneficiaries might differentiate the present case from a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Essex*, 343 F. Supp. 399, 412-13 (S. D. Ohio), Aff'd, 409 U.S. 808 (1972). Thus, our decision today does not

> compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill,' 38 USC §1651, impermissibly advance religion in violation of the Establishment Clause. *See also* n. 32, supra.

413 U. S. at 782-83 n. 38.

The Tennessee Student Assistance Program is a "form of public assistance . . . made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institutions benefited." As such, all the parties and the District Court agreed that this case presents the precise issue reserved in *Nyquist*. This alone is a compelling reason for granting plenary consideration of the issues raised herein.

That the Tennessee Student Assistance Program is made available to both public and private students does not, however, automatically insure its constitutionality; *Nyquist* itself is authority for this proposition. As previously indicated, the Court in *Nyquist* found the tuition reimbursements to be defective not only because of the limited class of beneficiaries but also because the "tuition grants . . . are subject to no . . . restrictions . . . to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." 413 U.S. at 783. In *Wolman v. Walter, supra,* the Court, quoting the above language from *Nyquist,* found *Nyquist* "compelled" the invalidation of a Ohio plan providing instructional materials to private school students, *even though it was part of a scheme for providing them for both public and private students,* because the materials would support sectarian aspects of their education. 45 USLW at 4866.

Nor does the fact that the Tennessee program aids college students and not elementary or secondary students automatically render it constitutional. In the *Nyquist* footnote reserving the issues presented in this case, the Court referred to a preceding

footnote that quoted the plurality observation in *Tilton v. Richardson,* 403 U. S. 672, 685 (1971), that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." While this may be true as a general proposition, *Tilton* itself stands for the principle that this is merely a rebuttable presumption, and that different constitutional considerations apply in the case of schools that are exceptions to the rule. In *Tilton,* the Court plurality, in upholding construction grants for secular buildings at substantially secular church-related schools, was careful to acknowledge that a different result might be reached in the case of pervasively religious colleges. 403 U.S. at 682.

Since at issue in this appeal is the application of the Tennessee program to students at sectarian colleges virtually indistinguishable from parochial elementary and secondary schools, the basis for the possible distinction between student aid programs at the parochial school and higher education levels recognized in *Nyquist* has no application to this case.

Note should also be taken of a difference between the students themselves at the two levels. The *Tilton* plurality observed also that:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional . . . limitations [on the construction grants].

403 U.S. at 686.

Significantly, in *Nyquist* the Court made no reference at all to this observation as a possible basis for distinguishing college

aid programs. This is not surprising, for it offers no real support for a defense of such aid, when the effect of the aid is at issue.

The observation was made with reference to the entanglement test and there is no suggestion in *Tilton* that the alleged skepticism of college students would have led the Court to sustain the construction grants had they not been carefully restricted to secular aspects of the colleges. Since the Establishment Clause forbids the State to finance the dissemination of religious propaganda, it would be a curious doctrine indeed that permitted State aid for such dissemination on grounds of the Court's guesswork that the skepticism of its targets might make the propaganda ineffective. Furthermore the "common observation" relied upon by the *Tilton* plurality also supports the conclusion that it is at the college level that many students modify their views on various issues, and that they may be quite susceptible to the influence of their college environment. Some evidence of this appears in the present record. A former student at David Lipscomb College testified that she felt it would have been "highly presumptive" at her stage of growth as a Lipscomb student to disagree with the religious views advocated by her Bible instructors.[35] She further testified that when she enrolled at Lipscomb she was a Baptist but that because of religious pressures to conform her beliefs to the majority point of view she changed her religious affiliation to the Church of Christ.[36]

In addition to the *Nyquist* footnote, the District Court found support for its conclusion that the Tennessee Student Assistance Program is constitutional in *Durham* v. *McLeod*, 259 S.C. 409, 192 S.E.2d 202, *dismissed for lack of a substantial federal question*, 413 U.S. 902 (1973) (Justices Douglas,

[35] Tr., Testimony of Patricia Morgan, p. 161.

[36] *Id.*

Brennan, and Marshall dissenting from the dismissal). In *Durham*, the South Carolina Supreme Court found that a loan guarantee program for college students did not violate the Establishment Clause. The District Court's views notwithstanding, *Durham* is unlike the present case. First, there was substantial doubt on the part of the South Carolina Supreme Court that state tax funds or credit were involved in the loan program. With respect to the loan guarantee aspects of the program, the funds used by the students to finance their education were borrowed from private lending institutions. In the case of a student default, the state guarantee was paid to the private lending institution. Thus the state involvement was several steps removed from direct educational grants. The state participation was not extensive and the state could not be said to be directly supporting the religious aspects of the students' education. *But most important of all, there does not even appear in the State Supreme Court's opinion any indication whatsoever that any of the schools were substantially sectarian in character.* An attack on the constitutionality of the loan program *on its face*—which alone was involved in *Durham*—without any evidence of the actual sectarian use of the loan proceeds is a far cry from the attack on the particular applications of the Tennessee program. It is thus clear that the question of the extent to which the Tennessee and South Carolina programs differ is, standing alone, sufficiently substantial to justify full briefing and oral argument.

All of the Establishment Clause precedents plainly demonstrate the substantiality of the present questions. As the Court noted in *Sloan* v. *Lemon*, in discussing *Everson* and *Allen*:

> Such [transportation and textbook] benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible. . . .

If paying for the transportation of children to sectarian schools as part of a general program for state payment of the cost of transporting both public and private school students goes to the very "verge" of the unconstitutional, how can payment of expenses related to their actual instruction, including its religious aspects, even though as part of a program for public and private students alike, be other than unconstitutional?

The rational answer must be that such payment is not constitutional, even though made to college students, in those cases in which the colleges attended are indistinguishable in their sectarian content from the parochial schools involved in *Everson, Allen, Nyquist, Sloan, Meek,* and *Wolman.*

C. The Challenged Program Impermissibly Advances Religion Because the Grants Provide Direct Support to the Sectarian Schools Attended by the Recipients.

As indicated previously, Appellants contend the Student Assistance Program is unconstitutional even if it is viewed purely as a student aid program offering no direct assistance to the colleges themselves. The reason is that the state purchase for the student religious education, even if the state does not give assistance directly to the religious school. Appellants alternatively contend, however, that the Program provides direct aid to the sectarian colleges attended by the Program's recipients. This contention, too, presents a substantial federal question.

While this Court has previously noted that not every benefit conferred upon church-related institutions is prohibited, it has properly recognized that the problem essentially is one of degree. *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). Thus this Court must carefully examine the extent to which the Tennessee Student Assistance Award Program supports the private colleges attended by the award recipients. Appellants insist that even a

program in which the assistance is channeled in the first analysis to students (or their parents) may also assist the schools attended in such a substantial way that the program is institutional aid within the meaning of the Establishment Clause. See, e.g., *Wolman v. Walter, supra* at 4867, in which the Court found that state-financed secular field trips, although made available to public as well as private students, were a form of direct assistance to the schools.

That the program financially supports private colleges, including the substantially sectarian ones, in a direct and substantial way, and that such support cannot realistically be characterized as merely "incidental," is shown by the record.

First, the record demonstrates that a substantial portion of the grant funds are channeled by the students into the schools' treasury for tuition and other expenses. The Executive Director of the Student Assistance Corporation recognized that most students spend the grants to pay tuition[37] and the District Judge who presided over the trial found that most students meet the "educational expenses" use requirement by satisfying debts incurred during the enrollment process.[38] The Court has previously found that tuition grants, though channeled through the conduit of the student, provide aid to the school itself. *Norwood v. Harrison,* 413 U.S. 455, 464-65 (1973); *Com. for Pub. Educ. v. Nyquist, supra.* See also *Lemon v. Sloan,* 340 F. Supp. 1356, 1364 (1972), *aff'd* 413 U.S. 828 (1973). State courts likewise have repeatedly found that tuition grants to college students have the practial effect of supporting the colleges. See, e.g., *Almond v. Day,* 197 Va. 419, 89 S. E. 2d 851, 857 (1955); *Synod v. Dakota v. State,* 2 S.D. 366, 374, 50 N.W. 632, 635 (1891) (state constitutional grounds).

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[37] Tr., Testimony of Kenneth P. Barber, p. 32.

[38] Tr., Testimony of Haward Wall, pp. 71-72 (observation by Judge Gray, based on evidence that students have not sought permission to use their grants for purposes other than liquidating enrollments debts).

Although it is for the Court to determine the practical effect of the program, the views of the sponsors of the Act and the private college officials themselves are persuasive on this issue. The sponsor of the Act explained to the General Assembly that the effect of the Act is to assist three groups—the students, the taxpayers, and the private colleges.[39] The Act, he said, "help(s) encourage and maintain a strong viable private higher education system" in Tennessee.[40] The extensive correspondence between the Director of the Tennessee Council of Private Colleges, who is a member of the state agency that administers the program, and the private college presidents reveals that the colleges themselves perceive the program as being of enormous—and perhaps critical—assistance to the schools.[41]

The program makes it possible for needy students who desire to attend private schools to do so; indeed, that is one of its purposes.[42] Two of the intervenor-appellees, for example, testified that without the financial assistance they could not have gone to the private colleges they preferred, and would have gone to public institutions.[43]

The program aids the schools by increasing enrollment, thus filling excess capacity and reducing fixed costs. Further, the schools rely very heavily on income from students[44] and if the financial aid burden on the institutions is partially relieved their financial condition is somewhat improved.[45] An analysis of

[39] Plaintiffs' exhibit 2, p. 1.

[40] *Id.*

[41] Plaintiffs' exhibits 3-21.

[42] Tr., Testimony of Nyles Ayers, pp. 50-51, 60.

[43] Tr., Testimony of Arlillian Jones, p. 255; Testimony of Collean Kehler, p. 259.

[44] Tr., Testimony of Nyles Ayers, p. 39.

[45] *Id.* at p. 60.

the financial condition of many of the colleges demonstrates their fear that unless certain enrollment trends and financial aid trends are reversed, some of the colleges would be forced out of business.[46] The effect of the Student Assistance Program was corroborated by the President of Trevecca Nazarene College, who admitted that Travecca was experiencing serious financial problems partly because significant numbers of students were either late in paying their tuition or not paying it at all.[47] Thirty-seven of its students received $43,066.00 in Student Assistance Awards in the 1976-77 academic year.[48]

It is true that the Court has held that the fact that bus rides or secular textbooks may make it possible for some children to attend a sectarian school who otherwise could not do so, "does not alone demonstrate an unconstitutional degree of support for a religious institution." *Board of Education v. Allen*, 392 U.S. at 244. Such holding does not adversely affect plaintiffs' argument that the instant program is substantial institutional aid to sectarian colleges. The Court observed that this kind of support to the schools was de minimus because in the cases of bus transportation and textbook programs "no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools." In the instant case, not only does the program make it possible for students to attend private schools who could not otherwise afford to, but once the student enrolls at the private school, the program channels state funds *into* the school. In *Everson* and *Allen* the bus rides and textbooks went to the student and did not accrue to the benefit of the school, while here the school gets not merely the student but also state funds in those cases in which the student uses the grant at the school.

[46] *Id.* at p. 60.

[47] Tr., Testimony of Mark R. Moore, pp. 181-85; Plaintiffs' exhibits 42, 43.

[48] Plaintiffs' exhibit 23.

Consequently, it is easy to understand the holding of the Virginia Supreme Court in *Almond v. Day*, 197 Va. 419, 89 S.E. 2d 851 (1955) that a program of State grants to both public and private school students, usable for "tuition, institutional fees, board, room rent, books and supplies" (a program similar to the instant case) violated the Establishment Clause because the program in effect provided "direct" benefit to the colleges. 89 S.E. 2d at 858.

Because in the instant case much of the government funds go ultimately to the colleges, the program is a direct benefit to the colleges themselves. Because the program does not restrict the benefit to the secular aspects of the colleges, it is unconstitutional.

D. The Challenged Act Is Unconstitutional on Its Face as Well as in Certain Applications.

Whether the challenged Act is unconstitutional on its face, as well as in its application to students attending schools having a dual sectarian-secular function, also raises a substantial question. If, as appellants insist, the program is constitutionally defective with respect to certain applications because it fails to contain beneficiary or use restrictions, the Act cannot be declared severable, so as to allow the grants to students attending secular colleges. The Court rejected such a severability argument in *Sloan v. Lemon*:

> We have been shown no reason to upset the District Court's conclusion that aid to the nonsectarian school could not be severed from aid to the sectarian. The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature adopted.

713 U.S. at 834.

The same is true in the instant case, even though the Tennessee Code contains a severability clause. The reason is that there is no provision in the Act that the Court could sever. To save the Act, it would be necessary to rewrite the Act to include certain restrictions not intended by the General Assembly. This is something the Court cannot do because the Court cannot assume the legislature would have enacted the law had it been so written. A reading of the Preamble to the Act (A-2) demonstrates that the legislature specifically rejected such restrictions. See *Champlin Rfg. v. Commission*, 286 U.S. 210, 234 (1932).

CONCLUSION

For the reasons set forth above, appellants respectfully submit that the federal questions presented by this appeal are so substantial that the Court should note probable jurisdiction and set the case for a plenary hearing.[49]

Respectfully submitted,

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[49] Appellants call to the Court's attention the Jursdictional Statement previously filed in this Court in the case of Smith, *et al.* v. Board of Governors of the University of North Carolina. The case involves a challenge to three North Carolina college aid programs, including a scholarship program for college students that may involve issues similar to those raised in this appeal. If probable jurisdiction is noted in both cases, appellants suggest that it would be appropriate to set the cases for oral argument on the same date.

Certificate of Service

I, the undersigned attorney for Appellants and a member of the bar of the Supreme Court of the United States, do hereby certify that pursuant to Supreme Court Rule 33, I have caused to be served true, correct, and sufficient copies of the foregoing Jurisdictional Statement upon each party required to be so served, by causing them to be deposited into a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to Mr. C. Hayes Cooney, Chief Deputy Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219, attorney for Appellees, and Mr. Charles H. Wilson, Williams and Connolly, 1000 Hill Building, Washington, D. C. 20006, attorney for Intervenor-Appellees.

Thomas H. Peebles III

APPENDIX

PUBLIC ACTS, 1976

Chapter No. 415

House Bill No. 1534

By Longley, Burnett (Fentress), Crowell, Hurley, King, Hillis, W. C. Carter, Blackburn, Naifeh, Bodiford, Williams, W. L. Carter, Lanier, Moore, Starnes, Chiles, Henry, Fuqua, Davidson (Wayne), Burleson, Webb, Murphy, (Shelby), Brewer, Miller (Hamblen), Spence, Richardson, Denton, Ramsey, Hendren, Cawood, Ford (Shelby), Kernell, Ellis, Davis, Withers, Bishop, Stallings, Murphy (Davidson), Bewley, Stafford, Bailey, Watson, Boner, Lashlee, Gaia, Ford (Cocke), Bousson, Wallace, Fisher, Buck, O'Brien, Clark (Davidson), Murray (Madison), Pruitt, DeBerry, Good, Steinhauer, Davidson (Robertson), Jenson, Marshall, Clark (Knox), Rowland, Sterling, Bates, Atchley (Knox), Murray (Franklin)

Substituted for: Senate Bill No. 1475

Baird (Wilson), White, Baker, Garland, Hooper, Koella, Thomas, Crouch, Ashe, Sullivan, Dunavant, Davis, Ford, Albright, Baird (Roane), Berry, Henry, Byrd, Talarico, Neal, Motlow, Person, Hamilton, Mr. Speaker Wilder

AN ACT to repeal Sections 49-5013 through 49-5021, Tennessee Code Annotated, relative to the Tennessee Tuition Grant Program; to establish the Tennessee Student Assistance Program and provide for its administration; and to amend Sections 49-5001, 49-5003 and 49-5004, Tennessee Code Annotated, relative to the Tennessee Student Assistance Corporation, its purposes, powers and duties.

WHEREAS, the Tennessee Tuition Grant Program was intended by the General Assembly to be a program of student financial assistance when it was enacted in 1971; and

WHEREAS, the program was declared unconstitutional by a three-judge United States District Court for the Middle District of Tennessee, Nashville Division, in 1974, in the case of Americans United for Separation of Church and State v. Dunn, 384 Fed. Supp. 714, as being in contravention of the establishment of religion clause of the First Amendment to the United States Constitution; and

WHEREAS, the court viewed the program as direct institutional assistance rather than student financial assistance because checks were sent to the institutions rather than the students; and

WHEREAS, the "Secular Use" restriction deemed necessary by the federal court to correct the constitutional defect and provided by amendment in 1975, is a feature of direct institutional aid programs and has not been held in any judicial proceeding to be a legal or constitutional requirement for a program of student financial assistance; and

WHEREAS, the ruling by the federal court in declaring the Tuition Grant Program unconstitutional because of the absence of a "Secular Use" restriction has had the effect of transforming what was intended to be a student financial assistance program into an institutional aid program; and

WHEREAS, the federal government provides, under the State Student Incentive Grant Program, matching federal funds to states wihch operate state student assistance programs and does not provide such incentive funds for direct institutional aid programs; and

WHEREAS, the resulting confusion can be corrected by repealing the Tuition Grant Program in its entirety and enacting

an entirely new student financial assistance program, thereby asserting the legislative intent of providing needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Sections 49-5013 through 49-5021, Tennessee Code Annotated, are repealed and the provisions of Sections 2 through 8 of this act are substituted in lieu thereof.

SECTION 2. There is established the Tennessee Student Assistance Program, which shall be administered by the Tennessee Student Assistance Corporation, under the following terms and conditions:

1. The Tennessee Student Assistance Corporation shall make awards of non-repayable financial assistance, from funds appropriated for that purpose, directly to needy undergraduate students who:

a. Are residents of Tennessee, as defined by regulations promulgated by the Board of Regents for the state university and community college system, under the authority of Section 49-3224 where applicable, or by the State Board of Education under the authority of Section 49-3252 where applicable.

b. Are enrolled or intend to enroll as full-time or part-time students in an institution of post-secondary education in Tennessee which is either:

(1) a public college or university; or

(2) a public vocational or technical institute; or

(3) a non-public college or university which is accredited by the Southern Association of Colleges and Schools.

c. Have complied with the applicable provisions of this chapter and the rules and regulations adopted by the Tennessee Student Assistance Corporation.

2. Awards of student assistance shall be available for residents of the state generally, without regard to county or other area of residence, race, color, creed, sex, or national origin or ancestry.

SECTION 3. It is expressly provided that payments of awards shall be made directly to the students in equal installments at the beginning of each academic term upon receipt by the Tennessee Student Assistance Corporation of evidence that the student is officially enrolled in an eligible institution.

SECTION 4. All awards of student assistance shall be based on the financial need of the student as measured by the parents' ability (or the student's ability if the student is emancipated and not receiving any financial assistance from his parents or guardian) to contribute to his educational expenses, as determined by guidelines established by the Tennessee Student Assistance Corporation. Maximum student assistance awards shall be the total amount of tuition and mandatory fees charged by the post-secondary institution for the academic year or one thousand, two hundred dollars ($1,200) whichever is less. Financial need of less than one hundred dollars ($100) shall render an applicant ineligible for an award.

SECTION 5. Each award of student assistance is renewable by the Tennessee Student Assistance Corporation annually for the equivalent of four (4) academic years or until such earlier time as a student receives a baccalaureate degree or has expended eight (8) semesters or twelve (12) quarter terms of enrollment. The Tennessee Student Assistance Corporation shall renew an award only upon the student's application and upon verification that the applicant has completed satisfactorily the work of the preceding year, that he remains a resident of the

state, and that his financial situation continues to warrant the award under the applicable provisions of this chapter and the policies of the Tennessee Student Assistance Corporation. The Tenneseee Student Assistance Corporation may grant a leave of absence to recipients entering military service.

SECTION 6. It is expressly provided that no attempt shall be made by any official or agency concerned with the administration of the Tennessee Student Assistance Corporation to influence the selection by an applicant of the institution which he might attend. No official or agency shall prorate or otherwise reduce an award below the amount of assistance determined by an objective analysis of financial need of the applicant.

SECTION 7. If the recipient of an award shall fail to comply with the rules of the Tennessee Student Assistance Corporation in respect to the use of such assistance, or shall fail to attain the minimum level of achievement prescribed for the retention of the assistance, or shall fail to observe the rules, regulations or conditions prescribed or imposed by such college or university on students, or shall for any reason be expelled or suspended from such college or university, or shall absent himself without leave, the Tennessee Student Assistance Corporation may, upon evidence, revoke the award, and the person holding the award shall not thereafter be entitled to further payment or benefits.

SECTION 8. Any award recipient who desires to transfer from one institution to another must notify the Tennessee Student Assistance Corporation and secure its authorization to transfer. Failure to notify the Tennessee Student Assistance Corporation and secure its authorization may result in the loss of the award.

SECTION 9. Section 49-5001, Tennessee Code Annotated, is amended by deleting therefrom the words "administer loan

and grant programs" and substituting in lieu thereof the words "administer student assistance programs".

SECTION 10. Section 49-5003, Tennessee Code Annotated, is amended by deleting from paragraph "1" the words "student loan or grant purposes" and substituting in lieu thereof the words "student assistance purposes".

SECTION 49-5003, Tennessee Code Annotated, is further amended by deleting from paragraph "2" the words "state tuition grants" and substituting in lieu thereof the words "state awards of financial assistance".

SECTION 11. Section 49-5004, Tennessee Code Annotated, is amended by deleting therefrom the words "making of grants" and substituting in lieu thereof the words "making of awards of financial assistance".

SECTION 12. This act shall take effect on becoming a law, the public welfare requiring it.

Passed: February 11, 1976

Ned R. McWherter,
Speaker of the House of Representatives
John S. Wilder,
Speaker of the Senate

Approved: February 18, 1976

Ray Blanton,
Governor

RULES OF TENNESSEE STUDENT ASSISTANCE CORPORATION

CHAPTER 1640-1-1

TENNESSEE STUDENT ASSISTANCE PROGRAM

TABLE OF CONTENTS

1640-1-1-.01 GENERAL REGULATIONS.

(1) It shall be the responsibility of the Tennessee Student Assistance Corporation (TSAC) to receive funds appropriated for the purpose of providing non-repayable financial assistance awards as distinguished from loans to needy students who are residents of the state.

(2) The Tennessee Student Assistance Corporation shall prescribe any reports to be made by a recipient of a student assistance award.

(3) TSAC shall present to the Tennessee Higher Education Commission annually a proposed budget for the administration of the program and the assistance award fund.

(4) No attempt shall be made by any official or agency concerned with the administration of the Tennessee Student Assistance Program to influence the selection by an applicant of the institution which he might attend.

(5) No official or agency shall prorate or otherwise reduce an award below the amount of assistance determined by an objective analysis of financial need of the applicant.

(6) Assistance awards shall be available for residents of the state generally, without regard to county or other area of residence, race, color, creed, sex, national origin, or ancestry.

(7) TSAC shall make awards to students enrolled or accepted for enrollment at non-public colleges or universities of their choice, provided the college or university is accredited (approved or accepted) by the Southern Association of Colleges and Schools, or at a public college, university, vocational or technical institute.

(8) Assistance awards shall be for the regular academic year (fall/winter/spring terms); however, any funds in the State allocation not expended during the regular school year may be awarded for the summer term.

(9) Mandatory fees shall be defined as those amounts which are charged of all students with the exception of room, board, and books. Specifically, this shall include the common fee or tuition for enrollment paid by all students. Special fees such as music, laboratory, and physical education are not to be considered for assistance award purposes.

(10) The confidential relationship of the applicant shall not be violated. Student files shall be utilized only by the Tennessee Student Assistance Corporation staff. Confidential information will not be released without written approval from the applicant or/and his parents. Statistical data may be released provided such reports do not identify individuals. Outside research projects may utilize reported statistical information, other requests will require approval by the Tennessee Student Assistance Corporation board of directors; and should such requests require special computer programming, care shall be taken to

protect the student's confidentiality and any expense generated by special requests shall be paid by the outside research project, provided, however, student records shall be accessible to the Comptroller of the Treasury for audit purposes.

(11) By Executive Order, the State Student Incentive Grant (SSIG) Program, which is federally funded, is administered by the Tennessee Student Assistance Corporation.

Authority: T.C.A. Section 49-5004. Administrative History. Original Rule filed January 23, 1976, effective April 15, 1976. Repealed and refiled July 6, 1976, effective August 5, 1976.

1640-1-1-.02 REGULATIONS RELATING TO INSTITUTIONS.

(1) Postsecondary institutions enrolling assistance award recipients shall be requested to certify to TSAC that each award recipient is in attendance, and whether he is in full or parttime attendance in accordance with the institution's definition thereof, at the beginning of each semester or quarter.

(2) Award recipients who withdraw after certification of enrollment but prior to the completion of the term will have the share of his award paid in accordance with the institution's published refund policies.

(3) The institution shall use all reasonable effort to assure that no assistance award recipient is granted aid greater than established need. The institution will notify the Corporation of any known recipient receiving other assistance, outside the control of the institution, which creates an over award.

(4) The institution will notify the Corporation of any assistance award recipient who is convicted of any criminal offense growing out of any student riot, protest, or disturbance.

Authority: T.C.A. Section 49-5004. Administrative History. Original Rule filed January 23, 1976, effective April 15, 1976. Repealed and refiled July 6, 1976, effective August 5, 1976.

1640-1-1-.03 REGULATIONS RELATING TO RECIPIENTS.

(1) An applicant shall be eligible for an award when the TSAC finds:

(a) He is a resident of Tennessee, as defined by regulations promulgated by the Board of Regents for the state university and community college system, under the authority of Section 49-3224 where applicable, or by the State Board of Education under the authority of Section 49-3252 where applicable.

(b) He is a needy undergraduate student.

(c) He is enrolled or intends to enroll as a full-time or part-time student in an institution of postsecondary education in Tennessee which is either:

1. a public college or university; or

2. a public vocational or technical institute; or

3. a non-public college or university which is accredited by the Southern Association of Colleges and Schools.

(d) He has applied for a Basic Educational Opportunity Grant under Title IV-A-1 of the Higher Education Act of 1965 as amended and has been assigned a Student Eligibility Index by the U. S. Office of Education or its contractor.

(e) He has complied with all the provisions of the Act and the rules and regulations adopted by the Tennessee Student Assistance Corporation.

(2) Each award of student assistance is renewable by the Tennessee Student Assistance Corporation annually for the equivalent of four (4) academic years or until such earlier time as a student receives a baccalaureate degree or has expended eight (8) semesters or twelve (12) quarter terms of enrollment. The Tennessee Student Assistance Corporation shall renew an award only upon the student's application and upon verification that the applicant has completed satisfactorily the work of the preceding year, that he remains a resident of the state, and that his financial situation continues to warrant the award under the applicable provisions of this chapter and the policies of the Tennessee Student Assistance Corporation. The Tennessee Student Assistance Corporation may grant a leave of absence to recipients entering military service.

(3) Should an award recipient fail to comply with the rules of the Tennessee Student Assistance Corporation in respect to the use of such assistance, or shall fail to attain the minimum level of achievement prescribed for retention of the assistance, or shall fail to observe the rules, regulations, or conditions prescribed or imposed by such college or university on students or shall for any reason be expelled or suspended from such college or university, or shall absent himself without leave, TSAC may upon evidence, revoke the award and the person holding the award shall not thereafter be entitled to further payment or benefits.

(4) A student shall be considered as showing promise of satisfactorily completing undergraduate work if his academic credentials are such that he is allowed to enroll in the college or university of his choice. He shall be considered as having satis-

factorily completed the previous years work if he remains enrolled at the institution even if on probation.

(5) Any award recipient who desires to transfer from one institution to another must notify the Tennessee Student Assistance Corporation in writing and secure its authorization to transfer. Failure to notify the Tennessee Student Assistance Corporation and secure its authorization may result in the loss of the award. Transfer adjustments will be made based on an alteration of need resulting from said transfer and upon availability of student assistance award funds.

(6) Any part-time or full-time student who is convicted of any criminal offense growing out of any student riot, protest or disturbance shall forfeit any further right to any award as provided herein, or any other financial assistance supported by state funds. Should any such student so convicted be, at that time, receiving such aid, it shall be immediately terminated.

(7) The Tennessee Student Assistance Corporation shall follow the same policy guidelines in determining independent or self-supporting students as established by the U.S. Office of Education, Division of Student Support. An independent student is one who:

(a) has not and will not be claimed as an exemption for Federal income tax purposes by any person except his or her spouse for the calendar year(s) in which aid is received and the calendar year prior to the academic year for which aid is requested;

(b) has not received and will not receive financial assistance of more than $600 from his or her parent(s) in the calendar year(s) in which aid is received and the calendar year prior to the academic year for which aid is requested; and

(c) has not lived or will not live for more than two consecutive weeks in the home of a parent during the calendar year(s) in which aid is requested and the calendar year prior to the academic year for which aid is requested.

(8) Students applying as independent or self-supporting shall be required to submit a certified statement verifying and supporting a claim for independent status.

(9) Assistance award recipients whose parents establish residence in another state after an award has been made shall continue eligibility for the balance of any expended portion of the award during the academic year for which the award is made.

(10) The Tennessee Student Assistance Corporation shall review annually the priority date for the receipt of applications. Subject to such review, and in the absence of board action establishing a different date, applications received prior to May 15 shall receive priority for awards. The Tennessee Student Assistance Corporation will continue to accept and process applications after the established date subject to availability of funds.

(11) Any award recipient who willingly falsifies any report or information to TSAC, the Tennessee Student Assistance Corporation upon evidence shall revoke such award and the person holding the award shall not thereafter be entitled to further payment of benefits.

(12) The applicant's Social Security number is required for practical administration in maintenance of records and for matching with the financial statement processed by ACT, CSS, or BEOG.

(13) Recipients must use Assistance Awards for educationally related expenses only. A recipient to whom credit has been extended during the enrollment process should give first priority

to the liquidation of that obligation before using the proceeds of the award to defray other educational expenses. Should the Assistance Award recipient not elect to liquidate debts incurred during the enrollment process, he must provide evidence satisfactory to the Tennessee Student Assistance Corporation that the Assistance Award will be used solely for educational expenses before payment of any portion of the Award will be made by the Corporation.

Statutory Authority: T.C.A. Section 49-5004. Administrative History. Original Rule filed January 23, 1976, effective April 15, 1976. Repealed and refiled July 6, 1976, effective August 5, 1976.

1640-1-1-.04 REGULATIONS GOVERNING AWARDS.

(1) All awards of student assistance shall be based on the financial need of the student as measured by the parents' ability (or the student's ability if the student is emancipated and not receiving any financial assistance from his parents or guardian) to contribute to his educational expenses, as determined by guidelines established by the Tennessee Student Assistance Corporation.

(2) Maximum student assistance awards shall be the total amount of tuition and mandatory fees charged by the post-secondary institution for the academic year or one thousand, two hundred dollars ($1,200) whichever is less. Financial need of less than one hundred dollars ($100) shall render an applicant ineligible for an award.

(3) To assist in determining the financial need of applicants, the need analysis services of the American College Testing Program and College Scholarship Service or the Federal Basic Educational Opportunity Grant Program shall be utilized to determine the parents' ability to contribute to the support of the

applicant. The financial need shall be reviewed and recommended by the TSAC professional staff.

(4) Applicants shall be divided into two categories, initial and renewal, and then ranked from the most needy to the least needy according to the expected parental contribution.

(5) Assistance Awards shall be granted first to needy renewal applicants and then to initial applicants with financial need.

(6) In determining the amount of an award, the Tennessee Student Assistance Corporation shall utilize the following procedures:

(a) The computation for each student shall include a factor of self-help which can be satisfied by any combination of loans and work.

(b) The family or independent student contribution, including the established factor of self-help and other known resources available to the student, shall determine the total resources available.

(c) The Tennessee Student Assistance Corporation shall establish a budget for each student's educational expenses consisting of tuition and/or fees, books, a standard amount for personal expenses, and the average room and board charges for resident students at the student's chosen institution or a standard living allowance for commuter or independent students.

(d) The total resources shall be subtracted from the student's budget. If the difference is greater than the tuition and/or mandatory fees at the college or university of the applicant's choice, then his award shall be the full tuition and/or mandatory fees not to exceed one thousand, two hundred dollars ($1,200). If the difference is less than the tuition and/or mandatory

fees, then the student's award shall be the amount of the difference except that no award shall be made if the difference is one hundred dollars ($100) or less.

(7) Standard items included in student budgets and standard self-help factors shall be reviewed and adopted annually by the Tennessee Student Assistance Corporation.

(8) Railroad Retirement benefits of award applicants shall be counted in the same manner as Social Security benefits under the uniform methodology approved by the U.S. Office of Education and adopted by American College Testing Scholarship Program.

(9) Assistance Award checks shall be made payable directly to the students in equal installments at the beginning of each academic term upon receipt by the Tennessee Student Assistance Corporation of evidence that the student is officially enrolled in an eligible institution.

(10) If available funds are exhausted before all eligible students have received an award, then priority shall be established by further ranking of the applicants according to the difference between the student's budget and the resources available with highest priority going to the greatest difference and the lowest priority being assigned to the smallest difference. This ranking shall be condary to the ranking by parental contribution.

Authority: T.C.A. Section 49-5004. Administrative History. Original Rule filed January 23, 1976, effective April 15, 1976. Repealed and refiled July 6, 1976, effective August 5, 1976.

Entered May 19, 1977

In the United States District Court for the Middle District of Tennessee, Nashville Division

Americans United for the Separation of Church and State, a District of Columbia Corporation; Harold Steele, Joseph H. Johnston, Robert W. Bogen, and Dr. Forrest F. Evans of Nashville, Tennessee

Plaintiffs

vs.

Ray Blanton, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. Ashley, Jr., Attorney General of the State of Tennessee; Harland Matthews, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; William Snodgrass, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; Dr. Wayne Brown, Vice-Chairman of the Tennessee Student Assistance Corporation; Dr. Nyles C. Ayres, Dr. Edward Boling, Mr. Claude Bond, Mr. Frank Brogden, Mr. Joseph Copeland, Dr. Sam Ingram, Mr. W. L. Jones, and Dr. Roy Nix, Members of the Tennessee Student Assistance Corporation

Defendants

and

No. 76-227-NA-CV

Loretta P. Beard, Margaret B. Brooks, Gloria A. Brown, Brenda S. Humfleet, Arlillian Jones, Colleen Kehler, Lawrence H. Newbell, Addie Marie Reid, Raymond A. Shriver, and John W. Smythia

Defendants-Intervenor

Before: Phillips, Chief Judge, U. S. Court of Appeals; Gray, Chief Judge, U. S. District Court, and Morton, U. S. District Judge.

Gray, Chief Judge, U. S. District Court.

This action for a preliminary and permanent injunction and for a declaratory judgment constitutes an attack upon the constitutionality of the "Tennessee Student Assistance Program" contained in T.C.A. §§ 49-5013, *et seq.*, a state program providing financial aid to needy college students. The plaintiffs herein consist of four citizens and taxpayers of Tennessee and a national organization incorporated in the District of Columbia; the original defendants are various state officials and members of the Tennessee Student Assistance Corporation responsible for the implementation of the program. Ten students who attend public and private institutions of higher education across the state and who also receive financial assistance under the challenged statutes were permitted to intervene as defendants.

Since this action was filed on June 23, 1976, prior to the repeal of 28 U.S.C. §§ 2281 and 2282 and the amendment of § 2284, a three-judge court was designated to hear the case pursuant to those statutes. The parties subsequently agreed to permit a single judge to take the live testimony and to rule on evidentiary matters, which procedure was to be followed by oral argument before the three-judge panel. The case was heard on the merits pursuant to the parties' agreement from

February 28, 1977, through March 3, 1977. All parties subsequently filed briefs and reply briefs as requested by the court.

In this suit brought under 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202, plaintiffs seek to have the Tennessee Student Assistance Act declared unconstitutional and to enjoin the defendants from enforcing the Act on the grounds that the Act, on its face and in its application is violative of the Establishment Clause[1] of the First Amendment to the Constitution of the United States. Specifically, the plaintiffs complain that the Act is a law "respecting the establishment of religion" in that it provides state funds which benefit church colleges and universities "operated for religious purposes and with religious requirements for students and faculty."

This court has previously considered a similiar constitutional challenge to a predecessor program, the Tennessee Tuition Grant Program, T.C.A. §§ 49-4601, *et seq.* On November 8, 1974, this court declared that the Tuition Grant Pragram which provided unrestricted tuition grants directly to colleges and universities, some of which were private institutions "engage[d] in substantial religious activity, violated the Establishment Clause of the First Amendment." *Americans United for the Separation of Church and State v. Dunn*, 348 F. Supp. 714 (M.D. Tenn. 1974). Before the Supreme Court could consider the appeal, the statute was amended and the Supreme Court vacated the judgment and remanded the case for reconsideration in light of the amendment. 421 U.S. 958 (1975). Before this court had an opportunity to reconsider its decision, the Tuition Grant Program was repealed in its entirety, and the

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[1] Although the plaintiffs' complaint contains an allegation that the challenged statute also violates the "Free Exercise" prohibition of the First Amendment, there was no evidence presented at the hearing to support that allegation. Moreover, the plaintiffs' post-trial brief indicates that this allegation has been dropped since the only arguments presented go to allegations under the Establishment Clause.

Tennessee General Assembly enacted the Tennessee Student Assistance Program now under consideration.[2]

The Tennessee Student Assistance Program, enacted as Chapter 415 of the Public Acts of 1976, now codified as T.C.A. §§ 49-5013-5021, has as its stated legislative purpose the following: ". . . providing needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee. . . ." In summary, the Act provides that state funds are to be made available to students directly, rather than to the college or university as under the former Tuition Grant Program. An award is to be made solely on the basis of a student's financial need as measured by the student's or parents' ability to pay. A student receiving aid may attend in Tennessee a public college or university, a public vocational or technical institute, or a non-public college or university accredited by the Southern Association of Colleges and Schools. The maximum award a student may receive is set at the total of tuition and fees, or $1,200, whichever is less. The Act states specifically that no effort is to be made by state officials or by the administering organization, the Tennessee Student Assistance Corporation, to influence a student's selection of institutions.

The actual operation of the Act is revealed in the rules, regulations, and procedures of the Tennessee Student Assistance Corporation (hereinafter referred to as the "Corporation") and in the testimony presented at the hearing. A student desiring aid completes an application and a financial disclosure statement. The student is ranked in priority first on his or his parents' ability to pay for his education and then on the amount of the student's need.[3] Once it is determined that a student is

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[2] The original case was dismissed as moot by this court on June 11, 1976, because the statute originally attacked as unconstitutional had been entirely repealed and replaced by the new act.

[3] For the current year, the level of potential student and parental contribution for students receiving awards did not get above zero dollars for any one student. Priorities were then assigned according to the student's need.

to receive an award, the Corporation verifies his enrollment with the institution and requests that a state warrant be issued in the student's name. Although the state warrant bears only the student's name and home address, usually all warrants for students attending a particular institution are mailed together to the institution's financial aid officer for distribution. As shown at the hearing, this method of disbursement has been adopted for two primary reasons: (1) the school term has usually begun by the time the warrants are prepared and the Corporation generally does not have the student's new school address; (2) this procedure provides a method by which the Corporation can monitor the use of the scholarship funds for "educationally related expenses only." With regard to the fiscal accountability function which was added at the request of the state comptroller, Regulation 13 provides that, if a recipient has received credit during the registration process, he "should" give first priority to the liquidation of these debts before he uses his aid for other educationally related expenses. If he does not elect to liquidate any outstanding debts, he must provide evidence to the Corporation that he will use the funds solely for educationally related expenses before the warrant will be delivered to him. Testimony was presented at the hearing to show that, while tuition is often paid by the award, other educationally related expenses such as room rent, bus fare, clothing and health care expenses can be and have been paid with program funds, and that the formula adopted for determining the actual amount of a student's need takes into account such personal expenses. If the student should decide to transfer from one institution to another he may do so and keep his assistance, provided he notifies the Corporation and approval is given.

The Tennessee Student Assistance Program is currently funded with an appropriation from the General Assembly in the amount of $750,000 and by a federal matching grant in the same amount. Evidence established the following breakdown of award money:

PERCENTAGE OF AWARDS

	Private School Students	Public School Students
July 24, 1976	53%	47%
November 29, 1976	40%	60%
February 3, 1977	41%	59%

PERCENTAGE OF FUNDS

	Private School Students	Public School Students
July 24, 1976	73%	27%
November 29, 1976	65%	35%
February 3, 1977	65%	35%

It should be noted here that the evidence adduced established that some, but not all, of the private schools whose students benefited from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization.

The First Amendment, made applicable to the states by the Fourteenth Amendment, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), forbids a state from enacting a "law respecting the establishment of religion." In reviewing state programs attacked upon Establishment Clause grounds, the Supreme Court has continued to use the tripartite test initially set forth in the 1971 *Lemon v. Kurtzman* decision, 403 U.S. 602 (1971). The Court recently described the test as follows:

> "First, the statute must have a secular legislative purpose. . . . Second, it must have a 'primary effect' that neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion."

Meek v. Pittenger, 421 U.S. 349, 358 (1975). *E.g., Roemer v. Board of Public Works of Maryland*, 427 U.S. 736 (1976); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973). This tripartite test appears to correspond with the three primary evils to religious freedom: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The Court has decreed that the test is not to be construed rigidly but is to serve only as a guide "with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger, supra*, at 359. Thus, total separation between church and state is not necessary. Instead, neutrality is what is required; incidental benefits conferred on religious institutions are not proscribed; and the crucial question in any case is whether state action approaches the Establishment Clause's three main concerns. *Committee for Public Education v. Nyquist, supra*, at 771-72.

With respect to the first prong of the test, plaintiffs concede that the legislative purpose of the Act is secular, that is, to provide needy students with the opportunity to attend the institutions of their choice. Similarly, there is no argument with respect to the third prong. No proof was presented at the hearing to show that the state is involved extensively in the operations of any religious institution. The primary if not the only interactions between the state and the institutions are in the verification and disbursement procedures. Since there is no secular use restriction placed upon the funds which flow from the student to the institution which might require extensive monitoring by the state, the plaintiffs concede that there is no impermissible entanglement. Thus, the only question remaining

is whether the Tennessee Student Assistance Program has a "primary effect which neither advances nor inhibits religion." *Meek v. Pittenger, supra,* at 358.

Although this court in *Dunn* chose to use the distinction between direct and indirect aid to religious institutions rather than the traditional three-part test, the holding in *Dunn* actually constitutes a finding that the unrestricted nature of the funds given directly to church-related institutions had a primary effect which advanced religion.[4] Similarly, the Supreme Court has used the primary effect prong to invalidate state statutes which provide direct aid to religious schools, unless such statutes contain proper safeguards against sectarian use. Thus, in *Meek v. Pittenger, supra,* the Court struck down a state statute providing for the direct loan of instructional materials to private institutions, saying the program had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools." *Id.,* at 363. In *Committee for Public Education and Religious Liberty v. Nyquist, supra,* unrestricted state funding of maintenance and repair services to private, predominantly Catholic, schools was denounced by the Court as having "a primary effect that advances religion in that it subsidizes directly the religious activity of sectarian elementary and secondary schools." *Id.,* at 774. In *Lemon v. Kurtzman, supra,* the Supreme Court struck down a program providing for reimbursement of certain operating expenditures to private, sectarian schools because the secular use restrictions necessary to avert the forbidden primary effect fostered excessive government entanglement with religion. *See also: Roemer v. Board of Public Works,* 427 U.S. 736 (1976) (validating a statute giving direct grants to college-level institutions providing funds are used for secular purposes).

[4] There was not any discussion of legislative purpose in the Dunn opinion. Similarly, the entanglement issue was never reached, probably because there was no secular use restriction requiring monitoring of the colleges by the state.

Plaintiffs argue first that the new Tennessee Assistance Program is actually a disguised tuition grant program, and therefore should be analyzed as in *Dunn* under the line of cases which require direct grants of aid to religious entities to be tempered by secular use restrictions. In support of this contention, the plaintiffs argue that Regulation 13, *supra,* coerces students into spending their scholarships at the institutions for fees or tuition, thus making the program indistinguishable from the former Tuition Grant Program. The court does not find this argument persuasive. In *Dunn,* this court found that the Tuition Grant Program required state funds to be used for tuition payments or fees. Indeed, the warrants under that program were issued to the institutions so the student had no choice in the matter. As noted above, the testimony at the hearing revealed that the student who receives a scholarship under the current program may use the funds for many personal needs. Even if he has an unliquidated debt at the institution he may receive his scholarship by providing evidence to the Corporation that he will use the funds for "educationally related expenses." The fact that the aid herein is not direct institutional aid as in the above cases may be shown by a hypothetical situation: if the plaintiffs sought the return to the state of monies distributed under the program as in *Roemer v. Board of Public Works, supra,* the court could not require the institutions to return the funds because the money is the student's and he may use it outside the institution.

While it is clear that direct institutional aid to religious schools must be, at minimum, restricted to the secular activities of the recipient institutions, the law with respect to funds disbursed to students is not so clear. Depending on the facts of the particular case, the Supreme Court has held both ways, first with the so-called "child benefit cases," *infra,* and next with *Committee for Public Education and Religious Liberty v. Nyquist, supra. See also: Sloan v. Lemon,* 413 U.S. 825 (1973).

That student aid programs are to be distinguished, at least to some degree, from direct institutional aid programs is shown by the child benefit cases. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court upheld a state program calling for the reimbursement of student bus fares to parents of children attending elementary and secondary schools, regardless of the public, private, sectarian, or nonsectarian nature of the institution attended. In *Board of Education v. Allen*, 392 U. S. 236 (1968), the Court upheld New York's statute requiring local public authorities to lend textbooks free of charge to all students in grades 7 through 12, including students attending parochial schools. Finally, in *Meek v. Pittenger*, 421 U.S. 349 (1975), the Supreme Court examined both sides of the problem and invalidated a Pennsylvania program providing instructional materials and professional services directly to private elementary and secondary schools, some of which were parochial, while it upheld a textbook loan program for children attending the same schools.

However, in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Supreme Court decreed that there was to be no automatic immunity for a statute which channeled aid to students rather than to schools directly. In addition to invalidating an institutional maintenance and repair provision discussed above and a tax exemption provision, the Court in *Nyquist* struck down a New York statute giving partial tuition grants to low income parents whose children attended private, predominantly catholic, elementary and secondary schools. The defendants in *Nyquist*, as in the case before this court, sought to apply the "child benefit" principles of *Everson* and *Allen* because parents, and not the institutions, were the recipents of the New York funds. In rejecting this argument, the Court said that the character of the recipients was only one factor to be considered in the analysis. Even though the state funds actually went to the parents, the Court declined to apply *Everson* and *Allen*, saying in those cases the

neutral nature of the aid given to all students (bus fares and secular textbooks) provided a kind of inherent secular use restriction which was not present in the New York tuition grants.

The plaintiffs argue that the Tennessee Student Assistance Program should be analyzed according to *Nyquist*, rather than according to *Everson* and *Allen* because the money given to students for their higher education is not inherently neutral and may eventually, in certain cases, fund some religious activity at an institution. Certainly, the express holding of these child benefit cases mandate only that aid to children attending both public and private schools is permissible when the aid is inherently secular in nature. However, to say that *Nyquist* forecasts the imminent rejection of the aid program herein is to ignore the point at which the *Nyquist* Court stopped.

The question herein is one which the Supreme Court specifically left open in *Nyquist*. Here, as in the child benefit cases and contrary to *Nyquist*, state funds are provided to students regardless of whether they attend a private or a public school. Here, contrary to *Nyquist* there is no proof showing the predominance of benefits to one religious group. The Supreme Court singled out these issues in *Nyquist* with the following note:

> "Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted. See *Wolman v. Essex*, 342 F. Supp. 399, 412-413 (S.D. Ohio), aff'd, 409 U.S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill,'

38 U.S.C. § 1651, impermissibly advance religion in violation of the Establishment Clause. *See also* n. 32, *supra*."

Nyquist, supra, at 782-83, n. 38.

Some discussion should be made of the citations within this footnote. First, it is significant that, within the very footnote in which the Court reserved the issue of the constitutionality of a broad-based college-level student aid program, it referred explicitly to the previous footnote that acknowledged the constitutional difference between the higher and lower levels of church-related education. *Id.*, at 777, n. 32. Specifically, the Court made reference in the cited footnote to *Tilton v. Richardson*, 403 U.S. 672 (1971), in which a plurality of the Supreme Court declared that "college students are less impressionable and less susceptible to religious indoctrination than younger students." *Id.*, at 686. Although this distinction was made in *Tilton* with reference to the entanglement issue, the reference to the distinction in the note dealing with primary effect seems significant since none of the scholarship type programs examined fully by the Supreme Court have dealt with higher education. Although there is no Supreme Court decision which goes directly to the issue of general scholarship funds given to college students without regard to the type of institution they attend, whether public or private, sectarian or nonsectarian, nor is there any case which examines the G. I. Bill or similar assistance programs on Establishment Clause grounds, the case which the Supreme Court in *Nyquist* cited in note 38 contains some dicta in support of the constitutionality of the Tennessee statute. This case, *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio), summarily *affirmed*, 409 U.S. 808 (1972), which also invalidated a program of tuition reimbursement to parents of students attending private, elementary, and secondary schools said, in part, as follows:

> "The reimbursement grant aspects of Section 3317.062 are directed only towards the parents of children who attend non-public schools. The limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute. All the cases in which the Court has upheld legislation attacked on Establishment Clause grounds, the affected class has been substantially broader than the class affected by the Ohio statute." 342 F. Supp. at 412.

The three-judge District Court in *Wolman* went on to say that in *Everson v. Board of Education*, 330 U.S. 1 (1947), all students received bus fares; in *Board of Education v. Allen*, 392 U.S. 236 (1968), all students received books, in *Walz v. Tax Commission*, 397 U.S. 664 (1970), all non-profit institutions received tax exemptions. This three-judge court then said, in note 17 at 412:

> "Defendants attempt to analogize the statute at bar to statutes which provide economic aid to R.O.T.C. students or student-veterans, regardless of the school at which they attend. This analogy must fail, for if religious schools indirectly derive benefit from such programs, this benefit is entirely incidental and subordinate to the legitimate secular purposes underlying their enactment—purposes which have nothing whatever to do with religion."

The dicta in *Wolman* seems particularly applicable to the case at hand. The Tennessee Student Assistance Program is not unlike the G. I. Bill. The latter provides that eligible veterans are to receive an educational assistance allowance "to meet, in part, the expenses of the veteran's subsistence, tuition, fees, supplies, books, equipment, and other educational costs." 38 U.S.C. § 1681. These costs are virtually identical to those termed "educationally related expenses" under the Tennessee Student Assistance Act.

Even if the footnote in *Nyquist* and the case cited therein are viewed merely as a reservation of a particular question by

the Supreme Court and not a forecast of the probable result, action by the Court on a case from the Supreme Court of South Carolina appears to lend further support to the constitutionality of the Tennessee program. In *Durham* v. *McLeod*, 192 S.E.2d 202 (1972), the South Carolina court determined that a statute which authorized a state agency to make, insure, or guarantee loans to students, regardless of the institution of higher education which they attended, did not violate either the Constitution of the United States or the Constitution of South Carolina. No restrictions were placed on the course of study undertaken by the borrower. After noting that emphasis was on the student, that all eligible institutions were free to compete for the students, and that the aid was to higher education but not to any institution or group of institutions, the court found the act "scrupulously neutral as between religion and irreligion and as between various religions." *Id.*, at 204. The appeal of this case to the Supreme Court was dismissed for lack of a substantial federal question, 413 U.S. 902 (1973), on the same date that *Nyquist* and the block of related cases were decided (June 25, 1973). Under recent Supreme Court opinions, *Hicks* v. *Miranda*, 422 U.S. 332, 343-44 (1975); *Colorado Springs Amusements, Ltd.* v. *Rizzo*, — U.S. —, 49 L.Ed.2d 1222 (Brennan dissenting from a denial of certiorari), such summary decisions of the Supreme Court on appeals are conclusive precedents regarding constitutional challenges to like statutes, " 'except when doctrinal developments indicate otherwise,' " *Hicks* v. *Miranda, supra*, at 344, quoting from *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 263, n. 3 (1967), or where the Court has noted probable jurisdiction in a similar case, *Steinberg* v. *Fusari*, 364 F. Supp. 922, *vacated on other grounds*, 419 U.S. 379, *rehearing denied*, 420 U.S. 955.

The plaintiffs argue that the *Durham* case should not control here since no public money or credit was to be used in South Carolina for the loans and since loans are inherently different from outright scholarships. The court is not persuaded by this

attempt to distinguish *Durham*. For purposes of Establishment Clause analysis, if a state loan program that provides money to students and perhaps makes it possible for a student to attend a religious college of his choice does not present a substantial question of sponsorship or financial support of religious institutions, then it does not appear that a state scholarship program should be viewed differently.

In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions.[5]

In enacting the Tennessee Student Assistance Program, the Tennessee General Assembly sought to provide needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian, or nonsectarian. To ensure that the neutral purpose would not be compromised, the General Assembly enacted a student aid program rather than an institutional aid program. The statute passes the relevant three-pronged inquiry, and the Court finds that the program, on its face and in its application, does not offend the values protected by the Establishment Clause.

An appropriate judgment will enter.

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[5] Plaintiffs incorrectly contend that the program provides an incentive to attend a private, rather than a public, college. While at least one of the intervenors testified at the hearing that the student aid enabled him to attend a private school, statistics offered at trial tended to discount this behavior. The statistics shown above indicate that, as of February 3, 1977, some 59 percent of the students receiving aid attended public institutions. Moreover, testimony at the hearing established that private college tuition averages in excess of the maximum student grant under the program, $1,200. A student at a public institution who qualifies for aid will have his entire tuition paid. Thus, if the program provides an incentive to select one college over the other, the incentive does not appear to be in favor of the private institution.

In the United States District Court for the Middle District of Tennessee, Nashville Division

Americans United for the Separation of Church and State, a District of Columbia Corporation; Harold Steele, Joseph H. Johnston, Robert W. Bogen, and Dr. Forrest F. Evans of Nashville, Tennessee

Plaintiffs

vs.

Ray Blanton, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. Ashley, Jr., Attorney General of the State of Tennessee; Harlan Matthews, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; William Snodgrass, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; Dr. Wayne Brown, Vice-Chairman of the Tennessee Student Assistance Corporation; Dr. Nyles C. Ayres, Dr. Edward Boling, Mr. Claude Bond, Mr. Frank Brogden, Mr. Joseph Copeland, Dr. Sam Ingram, Mr. W. L. Jones, and Dr. Roy Nix, Members of the Tennessee Student Assistance Corporation

Defendants

and

Loretta P. Beard, Margaret B. Brooks, Gloria A. Brown, Brenda S. Humfleet,

No. 76-227-NA-CV

Arlillian Jones, Colleen Kehler, Lawrence H. Newbell, Addie Marie Reid, Raymond A. Shriver, and John W. Smythia

Defendants-Intervenor

JUDGMENT

In accordance with the opinion entered contemporaneously herein, it is the Judgment of the court that the Complaint herein be **DISMISSED** on the merits.

For the Court:

/s/ FRED GRAY, JR.
Chief Judge

In the United States District Court for the Middle District of Tennessee, Nashville Division

Americans United for the Separation of Church and State, a District of Columbia Corporation; Harold Steele, Joseph H. Johnston, Robert W. Bogen, and Dr. Forrest F. Evans of Nashville, Tennessee

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Loretta P. Beard, Margaret B. Brooks, Gloria A. Brown, Brenda S. Humfleet,

No. 76-227-NA-CV

Arlillian Jones, Colleen Kehler, Lawrence H. Newbell, Addie Marie Reid, Raymond A. Shriver, and John W. Smythia

Defendants-Intervenor

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Americans United for the Separation of Church and State, a District of Columbia Corporation, Harold Steele, Joseph H. Johnston, Robert W. Bogen, and Dr. Forrest F. Evans, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the Final Judgment dismissing their Complaint on the merits entered in this action on May 19, 1977.

This appeal is taken pursuant to 28 USC §1253.

TRABUE, STURDIVANT & DeWITT

By /s/ THOMAS H. PEEBLES III

By /s/ GARY E. CRAWFORD
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Attorneys for Plaintiffs-Appellants

Certificate of Service

I, Thomas H. Peebles, one of the attorneys for Americans United for the Separation of Church and State, Harold Steele, Joseph H. Johnston, Robert W. Bogen, and Dr. Forrest F. Evans, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June, 1977, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties hereto as follows: (1) Ray Blanton, R. A. Asley, Jr., Harlan Matthews, William Snodgrass, Dr. Wayne Brown, Dr. Nyles C. Ayres, Dr. Edward Boling, Mr. Claude Bond, Mr. Frank Brogden, Mr. Joseph Copeland, Dr. Sam Ingram, Mr. W. L. Jones, and Dr. Roy Nix, Defendants, by mailing copies in a duly addressed envelope, with first class postage prepaid, to their attorney of record, C. Hayes Cooney, Chief Deputy Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219. (2) Loretta P. Beard, Margaret B. Brooks, Gloria A. Brown, Brenda S. Humfleet, Arillian Jones, Colleen Kehler, Lawrence H. Newbell, Addie Marie Reid, Raymond A. Shriver, and John W. Smythia, Intervening Defendants, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Charles H. Wilson, Williams & Connolly, 1000 Hill Building, Washington, D.C. 20006.

TRABUE, STURDIVANT & DeWITT

By /s/ THOMAS H. PEEBLES III
Attorneys for Plaintiffs-Appellants

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-250

AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, a District of Columbia Corporation; HAROLD STEELE, JOSEPH H. JOHNSTON, ROBERT W. BOGEN, and DR. FORREST F. EVANS, of Nashville, Tennessee,
Appellants,

vs.

RAY BLANTON, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. ASHLEY, JR., Attorney General of the State of Tennessee; HARLAN MATHEWS, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; WILLIAM SNODGRASS, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; DR. WAYNE BROWN, Vice-Chairman of the Tennessee Student Assistance Corporation; DR. NYLES C. AYRES, DR. EDWARD BOLING, MR. CLAUDE BOND, MR. FRANK BROGDEN, MR. JOSEPH COPELAND, DR. SAM INGRAM, MR. W. L. JONES, and DR. ROY NIX, Members of the Tennessee Student Assistance Corporation,
Appellees,

and

LORETTA P. BEARD, MARGARET B. BROOKS, GLORIA A. BROWN, BRENDA S. HUMFLEET, ARLILLIAN JONES, COLLEEN KEHLER, LAWRENCE H. NEWBELL, ADDIE MARIE REID, RAYMOND A. SHRIVER and JOHN W. SMYTHIA,
Intervenor-Appellees.

On Appeal from a Three-Judge United States District Court for the Middle District of Tennessee

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-250

AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, a District of Columbia Corporation; HAROLD STEELE, JOSEPH H. JOHNSTON, ROBERT W. BOGEN, and DR. FORREST F. EVANS, of Nashville, Tennessee,
Appellants,

vs.

RAY BLANTON, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. ASHLEY, JR., Attorney General of the State of Tennessee; HARLAN MATHEWS, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; WILLIAM SNODGRASS, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; DR. WAYNE BROWN, Vice-Chairman of the Tennessee Student Assistance Corporation; DR. NYLES C. AYRES, DR. EDWARD BOLING, MR. CLAUDE BOND, MR. FRANK BROGDEN, MR. JOSEPH COPELAND, DR. SAM INGRAM, MR. W. L. JONES, and DR. ROY NIX, Members of the Tennessee Student Assistance Corporation,
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Intervenor-Appellees.

On Appeal from a Three-Judge United States District Court for the Middle District of Tennessee

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellees, Ray Blanton, Governor of the State of Tennessee, etc., et al., defendants below, moved to affirm the judgment below on the ground that the District Court did not deviate from but, to

the contrary, faithfully applied the constitutional principles set forth in this Court's decisions on the Establishment Clause issues raised by this appeal, thus rendering the questions presented so unsubstantial that further review by this Court is unnecessary.

QUESTION PRESENTED

Whether the Tennessee Student Assistance Program, which provides financial assistance to needy students to attend the college of their choice, regardless of whether it is a public or non-public or sectarian or non-sectarian college, violates the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. The Challenged Statutes

In 1976, the Tennessee General Assembly enacted Chapter 415 of the Public Acts of 1976, now codified as Tennessee Code Annotated Secs. 49-5013—49-5021, with the express legislative purpose of:

> ". . . providing needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee. . . ."[1]

This legislation enacting the Student Assistance Program also expressly repealed an earlier Tuition Grant Program that

[1] The state statutes embodying the Tennessee Student Assistance Program may be found at pages A-1—A-6 of the appendix to the Jurisdictional Statement (hereinafter cited as J.S. App.).

had been the object of previous litigation in the case of *Americans United v. Dunn*, 384 F.Supp. 714 (1974).

Monetary awards under the Program are based solely on a financial need of the student, and are granted to residents of Tennessee ". . . without regard to county or other area of residence, race, color, creed, sex, or national origin or ancestry." J.S. App. p. A-4, and payment of awards are made directly to the students. J.S. App., p. A-4. The awards are available to students at public colleges and universities, public vocational or technical institutes, and non-public colleges or universities which are accredited by the Southern Association of Colleges and Schools. J.S. App., p. A-3 to A-4. An award recipient may transfer from one institution to another upon notification to the Tennessee Student Assistance Corporation and authorization to transfer from said Corporation. J.S. App., p. A-5.

The statutes provide specifically that no effort is to be made by state officials or by the administering organization, the Tenneseee Student Assistance Corporation, to influence a student's selection of institutions. J.S. App., p. A-5.

The maximum award available to a student under the Program is $1200, or the total amount of tuition and mandatory fees, whichever is the lesser amount. J.S. App. p. A-4. For the 1976-1977 academic year, the Program was funded with $1.5 million, one-half of which was appropriated by the Tennessee General Assembly, and the other half was provided by federal matching funds. J.S. App., p. A-21. The statutes expressly prohibit any official connected with the administration of the Program from influencing selection by an applicant of the institution which he might attend. J.S. App., p. A-5. During the 1976-1977 academic year, more than 2,000 students attending 35 private colleges and 21 public institutions received benefits under the Program, and, because of the limited level

of funding, less than one-fourth of all students who applied for assistance received awards.[2]

The opinion of the District Court accurately summarizes the actual operation of the Program during the 1976-1977 academic year. J.S. App., p. A-20 to A-21.

B. The Proceedings Below

The Appellants, who are one national organization with a chapter in Nashville, Tennessee, and four citizens and taxpayers of the State, filed their complaint herein for declaratory and injunctive relief challenging the constitutionality of the Tennessee Student Assistance Program, a statute of state-wide application, on June 23, 1976, pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202. Since the action was filed prior to the repeal of 28 U.S.C. §§ 2221 and 2222 and the amendment of § 2284, the case was properly heard pursuant to §§ 2281 and 2284 by a three-judge District Court.[3]

The complaint named as defendants several state officials charged with the responsibility for administering the program. Subsequently, ten students attending both public and private colleges who had qualified for awards under the Program, were permitted to intervene as defendants.

By agreement of the parties and with leave of the Court, a single District Judge was designated to conduct the evidentiary portion of this case, with the evidentiary hearing beginning on February 28, 1977, and lasting three days. The plaintiffs' case consisted of evidence about three (3) of the thirty-nine (39) private colleges and universities in Tennessee and about

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[2] Plaintiffs' exhibit No. 23.

[3] This action was commenced prior to the effective date of Pub. L. 94-381 amending 28 U.S.C. § 2284 and repealing 28 U.S.C. §§ 2281 and 2282.

the lobbying activities of the Tennessee Council of Private Colleges while the program was being considered by the Tennessee General Assembly. The state defendants placed in evidence the various documents used in administering the Program together with the testimony of the two public officials primarily responsible for administering the Program. The ten student intervenors presented testimony about the importance of the Program in financing their college educations, and their use of the monies awarded to them.

Immediately following the evidentiary hearing, the impaneled three-judge District Court was convened and heard argument by the parties and directed that post-hearing briefs be submitted. On May 19, 1977, the District Court issued its opinion ruling unanimously that the Student Assistance Program did not violate the Establishment Clause. On the same day, the Court entered its Judgment dismissing the complaint herein.

C. The Decision Below

The District Court found no merit in the Appellants' constitutional claim by applying the three-part Establishment Clause test of purpose, primary effect, and excessive entanglement that this Court's decisions have evolved over the past several years. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Meek v. Pittenger*, 421 U.S. 349 (1975). Since there was no serious dispute that the challenged statutes had the requisite secular purpose and had not generated excessive government entanglement with religion or religious institutions, the Court below focused on the primary effect branch of the controlling Establishment Clause test. J.S. App., pp. A-23 to A-24.

After distinguishing the analysis employed by this Court's Establishment Clause decisions in cases involving aid directly to church-related schools from those in which aid was pro-

vided directly to students attending such schools, the District Court initially addressed the Appellants' contention that the Student Assistance Program provided direct institutional aid and rejected that contention. J.S. App., pp. A-24 to A-27. The District Court then turned to the issue of whether the primary effect of the challenged aid program breached the constitutional command of government neutrality by examining the decisions of this Court which have applied the so-called "child benefit" theory. The District Court noted that, with one exception which it found not controlling, this Court has sustained the constitutionality of aid programs in situations wherein the aid has been provided to students, or their parents, and such aid is made available regardless of whether a student attends a public or non-public school.[4]

The exception, which was heavily relied upon by the Appellants, is, of course, the case of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), wherein this Court invalidated a New York program of tuition grants and tax credits to students attending parochial secondary and elementary schools.[5] The District Court held the *Nyquist* case not controlling by pointing out that in this case, in contrast to the *Nyquist* case, state funds are provided to students regardless of whether they attend a private or a public school and there is no proof in this record showing a predominance of benefits or any special benefit to any religious group.

The District Court also relied in part on a footnote in the *Nyquist* case which, the Appellees submit, clearly indicated that

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[4] *See, Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975).

[5] The Court also held unconstitutional a Pennsylvania program of tuition reimbursement for parents of students attending parochial elementary and secondary schools in the case of *Sloan v. Lemon*, 413 U.S. 825 (1973), on the same day it announced its decision in the *Nyquist* case.

this Court would have reached a contrary conclusion in the *Nyquist* case had it been reviewing a program such as the one herein involved. 413 U.S. at 782, n. 38. After analyzing the cases set forth in said footnote, the District Court concluded that the program herein involved had a primary effect which neither advanced nor prohibited religion.

In addition to the aforesaid footnote and an analysis of the authorities cited therein, the District Court also relied upon this Court's disposition of the case of *Durham v. McLeod*, 193 S.E. 2d 202 (1972), appeal dismissed, 413 U.S. 902 (1973), the same day that the *Nyquist* decision was rendered. In the *Durham* case the South Carolina Supreme Court held that a state statute authorizing a state agency to make, insure, or guarantee loans to students regardless of the institution of higher education which they attended did not violate either the Constitution of the United States or the Constitution of the State of South Carolina. That statute placed no restrictions on the course of study undertaken by the borrower. The Supreme Court of South Carolina concluded that the emphasis of the program was on the student, that all eligible institutions were free to compete for the students, and that the aid involved was to higher education and not to any institution or group of institutions. Therefore, that court concluded that the act or program was ". . . scrupulously neutral as between religion and irreligion and as between various religions." 193 S.E.2d at 204. Recognizing the precedential value of the dismissal of the *Durham* appeal the same day that the *Nyquist* case was decided, the District Court concluded that the Tennessee Student Assistance Program was constitutional on its face and as applied, stating:

> "In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is

favored by the program, nor are private or religious institutions favored over public institutions."

J.S. App., p. A-31.

In rejecting the Appellants' contention that the program involved provides an incentive to attend a private college rather than a public college, the District Court pointed out that statistical evidence introduced at the hearing showed that as of February 3, 1977, some fifty-nine percent (59%) of the students receiving aid attended public institutions, and that testimony at the hearing established that private college tuition averages in excess of the maximum student grant under the program, or $1,200. Therefore, the District Court concluded that if the program does provide any incentive to select one college over another, the incentive did not appear to be in favor of the private institutions.

Being convinced that the Tennessee Student Assistance Program was, as stated in the Act, a program to provide needy students with the opportunity to attend the higher education institution of their choice, regardless of whether it be public, private, sectarian or non-sectarian, and that the said program had a totally neutral purpose, the District Court concluded that the program herein involved was a student aid program rather than an institutional aid program and was valid on its face and as applied.

ARGUMENT

A. Further Review Not Warranted.

Commencing in 1971, this Court has issued several major opinions defining in various factual contexts the limitations the Establishment Clause imposes on government's power to provide public funds which benefit education in church-related schools. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), and *Wolman v. Walter*, 45 U.S.L.W. 4861 (U.S., June 21, 1977). Additionally, the Court has summarily affirmed[6] or refused to hear numerous other cases raising the same issue and two of these presented the exact issue posed by this appeal. *Americans United v. Rogers*, 528 S.W.2d 711, cert. denied 429 U.S. 1029 (1976), and *Durham v. McLeod, supra*.

The three-pronged test of purpose, primary effect and excessive entanglement is now firmly established as the legal basis for ascertaining the constitutionality of institutional aid programs, and the "child benefit" analysis is firmly established as the test of the validity of student aid programs. These decisions further establish that a clear constitutional line is to be drawn between aid to the elementary and secondary schools which are

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[6] *E.g., Wolman v. Essex*, 421 U.S. 982 (1975); *Franchise Tax Board v. United Americans for Public Schools*, 419 U.S. 890 (1974); *Luetkemeyer v. Kaufman*, 419 U.S. 888 (1974); *Marburger v. Public Funds for Public Schools*, 417 U.S. 961 (1974); *Grit v. Wolman*, 413 U.S. 901 (1973); *Essex v. Wolman*, 409 U.S. 808 (1973); *Brusea v. State Board of Education*, 405 U.S. 1050 (1972); *Sanders v. Johnson*, 403 U.S. 955 (1971).

church related and church-related colleges and universities. *E.g.*, *Committee for Public Education v. Nyquist, supra,* 413 U.S. at 777, n. 32, and *Tilton v. Richardson, supra,* 403 U.S. at 685. While the Court has upheld the programs of aid to the church-related colleges it has reviewed, it has struck down public aid to parochial elementary and secondary schools. *Roemer v. Board of Public Works, supra; Tilton v. Richardson, supra,* and *Hunt v. McNair, supra.*

These Appellees submit that since this Court has heretofore on several occasions defined the constitutional issues to be decided in this type of case, and the Appellants have failed to demonstrate convincingly that the District Court herein disregarded the controlling constitutional criteria established by the Court, their appeal herein should fail. A reading of the District Court's opinion herein reflects no deviation from this Court's recent decisions and the governing constitutional criteria established therein. Thus, the decision below should be summarily affirmed by this Court.

B. Proper Student Aid Analysis.

As aforesaid, this Court has given separate and distinct considerations to cases involving direct aid to church-related schools and aid to students who may attend such schools.[7] The District Court herein appropriately concluded that the program herein involved was one of student aid, not institutional aid. These Appellees submit that the proper analysis for student aid programs is more limited than the test to be applied to student aid programs under relevant decisions of this Court. As this Court has previously stated, the "test" utilized in prior Establishment

[7] *See, e.g., Roemer v. Board of Public Works, supra; Tilton v. Richardson, supra; Lemon v. Kurtzman, supra; Allen v. Board of Education, supra; Everson v. Board of Education, supra.*

Clause cases ". . . serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger, supra,* 421 U.S. at 359; *Tilton v. Richardson, supra,* 403 U.S. at 677-78. In the recent case of *Roemer v. Board of Public Works,* Mr. Justice Blackmum announced the judgment of the Court in its plurality opinion and stated that the applicable constitutional standard is:

> "Neutrality is what is required. The state must confine itself to secular objectives and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied."
>
> (93 S.Ct. at 2345)

The District Court in its opinion herein strove assiduously to determine that the program involved was one of neutrality and found that it was.

As to programs providing public aid directly to church-related schools, these Appellees submit that this Court's decisions indicate that the central inquiry is whether the institutions involved are eligible for the aid or are of such character that to aid them will aid or advance religion. The test in such cases is whether the educational programs at eligible church-related institutions are permeated with religion, or, as stated in *Hunt v. McNair, supra,* whether the public funds flow:

> "To an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."
>
> (413 U.S. at 743)

Likewise, in the recent case of *Roemer v. Board of Public Works, supra,* the Court affirmed this approach stating that in such cases:

"Our holdings are better reconciled in terms of the character of the aided institution when institutional aid programs are challenged."

(49 L.Ed.2d at 199)

These Appellees submitted, however, that when examining a program such as the Tennessee Student Assistance Program herein involved, the Court's relevant decisions make clear that no such institutional eligibility analysis is constitutionally mandated or required. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968), and the textbook loan portions of *Meek v. Pittenger, supra*, and *Wolman v. Walter, supra*. In student aid programs the religious character of the schools involved have not been a predominant consideration, and the entanglement branch of the three-part test applied to institutional aid programs does not appear to have been of importance. These Appellees recognize that merely because aid is channeled to students or their parents rather than directly to church-related schools, a program's constitutional validity is not completely established. Rather, this is "one among many factors" to be considered. *Committee for Public Education v. Nyquist, supra*, 413 U.S. at 781. In the *Nyquist* case, *supra*, the Court noted that the benefits of the programs challenged in the *Everson* and *Allen* cases, *supra*, were available to children at both public and private schools. 413 U.S. at 782, n. 38. Additionally, in the *Nyquist* decision the Court cited, with approval, its summary affirmance [409 U.S. 808 (1972)] of the decision in *Wolman v. Essex*, 342 F.Supp. 399 (S.D. Ohio). In the *Essex* case the program's benefits were available only to private school students and those students predominantly attended Roman Catholic schools.

On the same day the Court decided the *Nyquist* case, *supra*, it summarily dismissed, for want of a substantial federal question, the appeal of a case challenging on constitutional grounds a South Carolina student aid program that had those precise

characteristics. *Durham v. McLeod, supra*. As aforesaid, the South Carolina Supreme Court in the *Durham* case observed that under that program all public and non-public college students were eligible to borrow funds, and the aid was to the students and not to the institutions.

As aforesaid, the District Court herein found that there was no dispute that the program had secular objectives and also found that the effect of the program was scrupulously neutral in terms of neither advancing or impeding religion. J.S. App., p. A-31. In so concluding, these Appellees submit that the District Court correctly applied the controlling decisions of this Court on the issues involved, and further review by this Court is not warranted.

C. Requirement of Secular Use Restriction

The Appellants contend that to pass constitutional muster a student aid program must

"1) be made available to both public and private students alike so that no one religious group receives a special benefit, and 2) be restricted in such fashion to guarantee that the State is supporting only the secular portion of the students' education."

J.S., pp. 8-13.

While this Court has ruled that secular restrictions of the type described by the Appellants are a necessary element of institutional aid programs, *Tilton v. Richardson, supra*, and *Hunt v. McNair, supra*, this Court on no occasion has ruled that such restrictions must constitutionally be contained in the student aid program.

The Appellants, in support of this contention, rely on the *Nyquist* decision but these Appellees submit that that decision affords no support to this contention. The Court perceived the

New York tuition grant program involved in the *Nyquist* case as an institutional aid program. 413 U.S. at 783, and the absence of a secular use restriction to confine the aid to the secular aspects of the sectarian elementary and secondary schools involved was fatal to the program.

Likewise, the Court's decisions in *Wolman v. Walter, supra; Meek v. Pittenger, supra; Board of Education v. Allen, supra,* and *Everson v. Board of Education, supra,* furnish no support for this contention by the Appellants. In this regard, these decisions furnish support only for the contention that the Establishment Clause imposes a bar to the state's providing religious texts to assist the educational process whether it be in private or public schools. In the *Meek* and *Wolman* decisions, *supra,* the secular textbook loan programs were upheld despite the fact that students in sectarian schools were to utilize the textbooks.

The requirement that the aid provided must be neutral was satisfied in the *Wolman, Meek* and *Allen* cases since the state provided textbooks which were secular in content. In the instant case, the state is providing money for the students to use for educationally related expenses, and there can be no argument that money itself is either religious or sectarian in nature. Indeed, this aid is generally available to needy students regardless of the nature of the institution of higher education which they choose to attend.

Therefore, these Appellees submit that the program herein involved meets the requirement that the aid provided in student aid programs be secular in nature, and that an absence of secular use restrictions in this program is not constitutionally fatal.

D. Financial Support of Religious Education

Appellants also argue that this Program is unconstitutional because it assists students in obtaining a religious education, J.S., pp. 11-22, or in the alternative, it provides direct support to sectarian colleges, J.S., pp. 22-26.

The Appellants present evidence regarding only three of the twenty-six private colleges in Tennessee whose students receive awards of money from the aid program involved, and there is no evidence of any religious affiliation of the other twenty-three such private colleges. Six of the ten intervenors whose testimony was presented attended colleges with varying degrees of religious orientations. Their testimony established that their schools were of a nature closely resembling those found eligible for direct institutional aid in the cases of *Roemer v. Board of Public Works, supra,* and *Tilton v. Richardson, supra.* While it is true that the District Court observed that "some but not all of the private schools whose students benefited from this program were operated for religious purposes, with religious requirements for students and faculty, and were admittedly permeated with the dogma of the sponsoring religious organization," (J.S. App., p. A-22) the record does not reveal the names of the institutions in the mind of the Court. These Appellees submit that this finding does not establish that even those institutions provide an education religious in nature. Again, institutions with religious characteristics were found not ineligible for direct aid in the *Roemer* and *Tilton* decisions, *supra.*

The Appellants contend that they presented evidence of three colleges with overwhelming sectarianism but support this contention with selected pieces of evidence about only one of those three colleges. J.S., pp. 13-16. These Appellees submit that a review of all the evidence presented concerning that one college would refute that contention. Notwithstanding the fact that some of the students who benefit from this program may attend colleges which are substantially religious in nature, such fact does not render this program, which is a student aid program, unconstitutional. In the *Wolman* and *Meek* cases, *supra,* the students receiving textbook loans were enrolled in pervasively sectarian parochial schools, but this Court nevertheless upheld

those programs. Thus, these Appellees submit that the aid herein involved being neutral in nature, the District Court correctly sustained the constitutionality of the program.

As aforesaid, the Appellants apparently alternatively contend that the program involved impermissibly provided indirect support to sectarian colleges, and base that contention upon the fact that some students who attend church-related colleges may choose to pay tuition bills with their awards, and therefore, state funds would be channeled into the coffers of ineligible institutions.

As recognized by the District Court, the program herein involved is one of student aid, not institutional aid. The evidence established that the students were paid the awards in their own names and that students, not colleges, must establish their eligibility for the awards. Likewise, the testimony revealed that the student who receives an award under this program may use the funds for many personal needs. Even though a student may have an unliquidated debt at the institution, he or she may receive their award, in accordance with the regulations of the program, by providing evidence to the Corporation that he or she will use the funds for educationally related expenses. As pointed out by the District Court, one salient fact establishes that this program is one of student aid:

> "The fact that the aid herein is not direct institutional aid as in the above cases may be shown by a hypothetical situation: If the plaintiffs sought the return to the state of monies distributed under the program as in *Roemer v. Board of Public Works, supra,* the court could not require the institutions to return the funds because the money is the student's and he may use it outside the institution."
>
> J.S. App., p. A-25.

As further found by the District Court, the testimony at the hearing showed that:

> ". . . while tuition is often paid by the award, other educationally related expenses such as room rent, bus fare, clothing and health care expenses, can be and have been paid with Program funds, and that the formula adopted for determining the actual amount of a student's need takes into account such personal expenses. If the student should decide to transfer from one institution to another, he may do so and keep his assistance, provided he notifies the Corporation and approval is given."
>
> J.S. App., p. A-21.

Thus, the evidence establishes that any benefit a college might receive under this Program is incidental and indirect. The Appellants' contention that to the extent the Program permits a student to attend a private college which he might not otherwise be able to attend, it is unconstitutional, has been previously conclusively disposed of by this Court in the *Board of Education v. Allen* decision, *supra,* 392 U.S. at 244, adverse to the Appellants.

Therefore, these Appellees submit that this Program meets all the constitutional requirements set forth in this Court's decisions and that the District Court's decision herein is constitutionally sound.

CONCLUSION

The judgment below should be affirmed summarily because no substantial question remains justifying plenary review by this Court.

Respectfully submitted,

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Chief Deputy Attorney General
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-250

AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, a District of Columbia Corporation; HAROLD STEELE, JOSEPH H. JOHNSTON, ROBERT W. BOGEN, and DR. FORREST F. EVANS of Nashville, Tennessee, *Appellants*,

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On Appeal from a Three-Judge United States District Court for the Middle District of Tennessee

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Loretta P. Beard, *et al.*, intervenor-defendants below, move to affirm the judgment of the district court on the ground that the district court faithfully adhered to and applied the constitutional principles set forth in this Court's decisions on the Establishment Clause issues presented by this appeal, thus rendering the question presented so unsubstantial that further review by this Court is unnecessary.

QUESTION PRESENTED

Does the Tennessee Student Assistance Program, which provides financial assistance to needy students to attend the college of their choice—whether it be a public or nonpublic or a sectarian or nonsectarian college—violate the Establishment Clause of the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. The Challenged Aid Program

At its 1976 session, the Tennessee General Assembly enacted the Student Assistance Program ("Program") to "provid[e] needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee." 1976 Tenn. Pub. Acts, ch. 415.[1] Consistent with that intent, the enabling legislation provides that "payment of awards shall be

[1] The enabling legislation for the Student Assistance Program is reprinted in full at pages A-1 to A-6 of the Appendix to the Jurisdictional Statement (hereinafter cited as J.S. App.).

made directly to the students." J.S. App., p. A-4.[2] The court below found that legislative directive was implemented by the issuance of state warrants to qualified students made out only in the name of the student. J.S. App., pp. A-20 to A-21.

Awards under the Program are based solely on the financial need of the student and are granted to residents of Tennessee "without regard to . . . race, color, creed, sex, or national origin or ancestry." J.S. App., p. A-4. Awards are available to students at public colleges and universities, public vocational and technical institutes, and nonpublic colleges and universities accredited by the Southern Association of Colleges and Schools. J.S. App., p. A-3. The enabling legislation explicitly provides that "no attempt shall be made" by any official connected with the administration of the Program "to influence the selection by an applicant of the institution which he might attend." J.S. App., p. A-5. During the 1976-77 academic year, more than 2,000 students attending 35 private colleges and 21 public institutions received benefits under the Program.[3]

The maximum award available under the Program is $1,200 or the total amount of tuition and mandatory fees, whichever is the lesser amount. J.S. App., p. A-4.

[2] As noted by the appellants, the legislation enacting the Student Assistance Program expressly repealed an earlier Tuition Grant Program that had been the object of previous litigation. Juris. Stmt., p. 4. Under the Tuition Grant Program, awards were paid not to the students who had qualified for them but directly to the institutions they attended. As the district court acknowledged, that method of payment had prompted it to treat the Tuition Grant Program as one of institutional aid, rather than student aid, in the earlier litigation. J.S. App., p. A-24.

[3] Plaintiffs' Exhibit No. 23.

For the 1976-1977 academic year, the Program was funded at $1.5 million, one-half of which was appropriated by the Tennessee General Assembly and the other half of which was provided by federal matching funds. J.S. App., p. A-21. Because of the limited level of funding, less than one-fourth of all students who applied for assistance received awards.[4]

As the appellants have noted, the opinion of the district court accurately and succinctly summarizes the actual operation of the Program during the 1976-1977 academic year. See J.S. App., pp. A-20 to A-21.

B. The Proceedings Below

The plaintiffs, one organization and four individual taxpayers, filed their complaint challenging the Student Assistance Program on June 23, 1976. Because the plaintiffs sought to enjoin on federal constitutional grounds a statute of statewide application and because the complaint was filed before the repeal of 28 U.S.C. § 2281,[5] a district court of three judges was convened to hear and decide the case.

The complaint named as defendants several state officials responsible for administering the challenged aid program. Subsequently, ten students who had qualified for awards under the Program were permitted to intervene as defendants. Those students attend both public and private colleges.

By agreement of the parties, a single judge was designated to conduct the evidentiary hearing, which began on February 28, 1977, and lasted three days. The

[4] Plaintiffs' Exhibit No. 23.

[5] Pub. L. No. 94-381, 90 Stat. 1119 (1976).

plaintiffs' case consisted of evidence about three of the 39 private colleges and universities in Tennessee and about the lobbying activities of the Tennessee Council of Private Colleges while the Program was being considered by the General Assembly. The state defendants placed in evidence the various documents used in administering the Program and offered the testimony of the two public officials responsible for administering the Program. The ten student intervenors presented testimony about the importance of the Program in financing their college educations.

Immediately following the evidentiary hearing, the district court heard argument by the parties and requested that the parties submit post-hearing briefs. On May 19, 1977, the district court issued its opinion, ruling unanimously that the Student Assistance Program did not violate the Establishment Clause. On the same day, the court entered its judgment dismissing the complaint.

C. The Decision Below

The district court began its constitutional analysis by reciting the three-part test of purpose, primary effect and excessive entanglement that this Court's decisions on the issue of public aid to church-related institutions of higher education have evolved over the past six years. That test was applicable to the appellants' Establishment Clause claim because of the district court's finding that "some, but not all, of the private schools whose students benefited from this program are operated for religious purposes." J.S. App., p. A-22. However, the district court also heeded this Court's admonishment that the three-part test is not

to be applied rigidly and mechanically.[6] Rather, the court recognized that the various components of the three-part test are simply guidelines to assist in identifying when the values protected by the Establishment Clause might be impaired. And the district court correctly identified government neutrality in matters affecting religion as the crucial value that the Establishment Clause safeguards.[7] J.S. App., p. A-23.

Because the appellants conceded that the Tennessee aid program had the requisite secular purpose and had not generated excessive government entanglement with religion or religious institutions, the district court's opinion addressed the single question whether that Program had a primary effect that either advanced or inhibited religion. Recognizing that the analysis employed in this Court's Establishment Clause decisions varied depending on whether the challenged aid was provided directly to church-related schools or to students attending such schools, the district court first addressed appellants' contention that the Student Assistance Program provided direct institutional aid and rejected that contention. J.S. App., pp. A-24 to A-25.

The district court then examined whether the primary effect of the challenged aid program breached the constitutional command of government neutrality by analyzing those decisions of this Court which have applied the so-called "child benefit" theory. With one exception, the district court found that this Court has sus-

[6] *E.g.*, *Meek* v. *Pittenger*, 421 U.S. 349, 358-59 (1975); *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971).

[7] *E.g.*, *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976).

tained the constitutionality of aid programs when the aid has been provided to students, or their parents.[8] The exception is *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), in which the Court, *inter alia*, struck down a New York program of tuition grants and tax credits to students attending parochial elementary and secondary schools.[9]

The appellants contended that *Nyquist* was controlling in this case and doomed the Tennessee program. The district court disagreed, noting in part:

> "Here, as in the child benefit cases and contrary to *Nyquist*, state funds are provided to students regardless of whether they attend a private or a public school. Here, contrary to *Nyquist* there is no proof showing the predominance of benefits to one religious group." J.S. App., p. A-27.

The district court also relied on a footnote in the *Nyquist* decision that clearly suggested that the Court would have reached a contrary conclusion had it been reviewing a program of aid for college students that was made available irrespective of the sectarian-nonsectarian or public-nonpublic nature of the institutions attended by those students. 413 U.S. at 782 n.38. The district court's analysis of that footnote, and the authorities cited in the footnote, persuaded it that the challenged Tennessee program had a primary effect that neither advanced nor inhibited religion.

[8] See *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

[9] On the same day that it decided *Nyquist*, the Court also invalidated a Pennsylvania program of tuition reimbursement for parents of students attending parochial elementary and secondary schools. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

The district court found further support for that conclusion in this Court's disposition of the case of *Durham* v. *McLeod*, 192 S.E.2d 202 (1972), *appeal dismissed*, 413 U.S. 902 (1973), the same day that *Nyquist* was decided. At issue in *Durham* was a South Carolina program that provided loans to college students irrespective of whether they attended public or nonpublic, or sectarian or nonsectarian institutions. In rejecting an Establishment Clause challenge to that program, the South Carolina Supreme Court had observed that the program was "scrupulously neutral as between religion and irreligion and as between various religions." 192 S.E.2d at 204. Relying on recent decisions of this Court, the district court ruled that the dismissal of the *Durham* appeal the same day that *Nyquist* was decided was conclusive precedent supporting the constitutionality of the Tennessee program. Thus, the district court concluded:

> "In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions." J.S. App., p. A-31.

Satisfied that the Student Assistance Program had a primary effect that neither advanced nor inhibited religion, the district court entered judgment for the appellees.

ARGUMENT

A. Further Review Is Not Warranted

Over the past six years, few constitutional questions have received the careful scrutiny that this Court has

given to the issue of the Establishment Clause validity of programs of public aid that benefit church-related education. Since 1971, the Court has granted plenary review and written full opinions in nine cases presenting that issue. *Wolman* v. *Walter*, 45 U.S.L.W. 4861 (U.S., June 21, 1977); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education* v. *Nyquist, supra; Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In addition, the Court has summarily affirmed[10] or refused to hear numerous other cases raising the same issue, including two that presented the precise issue posed by this appeal. *Americans United* v. *Rogers*, 528 S.W.2d 711, *cert. den.*, 429 U.S. 1029 (1976); *Durham* v. *McLeod, supra.*

Those many decisions have examined the aid question in a variety of factual contexts, have explored fully the Establishment Clause values and concerns implicit in such aid programs, and have set forth the appropriate constitutional analysis for evaluating the validity of such aid programs. One effect of the Court's exhaustive examination of the public aid issue has been to fix firmly the three-pronged test of purpose, primary effect and excessive entanglement as the basis for as-

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[10] *E.g.*, *Franchise Tax Board* v. *United Americans for Public Schools*, 419 U.S. 890 (1974); *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974); *Marburger* v. *Public Funds for Public Schools*, 417 U.S. 961 (1974); *Grit* v. *Wolman*, 413 U.S. 901 (1973); *Essex* v. *Wolman*, 409 U.S. 808 (1973); *Brusea* v. *State Board of Education*, 405 U.S. 1050 (1972); *Sanders* v. *Johnson*, 403 U.S. 955 (1971). See also *Wolman* v. *Essex*, 421 U.S. 982 (1975), vacating a district court decision in light of *Meek* v. *Pittenger, supra.*

sessing the constitutionality of institutional aid programs and the "child benefit" analysis as the test of the validity of student aid programs. Another effect of those decisions has been to draw a sharp constitutional line between aid to church-related institutions of higher education and aid to the lower levels of church-related education. *E.g., Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 777 n.32; *Tilton* v. *Richardson, supra,* 403 U.S. at 685-86. As a result, the Court has upheld each program of aid to church-related colleges it has reviewed.[11]

Thus, with respect to the Establishment Clause issue presented by this appeal, this Court has clearly fulfilled its constitutional duty to define the controlling constitutional criteria and to illustrate the application of those criteria in a variety of factual contexts. The time has now come to permit the lower courts to apply those criteria as challenges to new aid programs arise. Any other approach would necessarily require that this Court grant plenary review in every case reaching it which challenges educational aid programs that benefit church-related education directly or indirectly.

These appellees submit that plenary review of this appeal is warranted only if the appellants can demonstrate convincingly that the court below disregarded the controlling constitutional criteria established by this Court or applied those criteria in a manner inconsistent with the fundamental values underlying the Establishment Clause. These appellees further submit, and will demonstrate below, that the appellants have not and cannot make any such showing. Even a cursory reading of the district court's opinion will reveal that

[11] *Roemer* v. *Board of Public Works, supra; Hunt* v. *McNair, supra; Tilton* v. *Richardson, supra.*

it strictly and faithfully adhered to and applied the governing constitutional criteria set forth in this Court's recent decisions. Thus, the decision below should be summarily affirmed.

B. Student Aid Analysis

This Court's decisions on the issue of public aid to church-related education can be divided into two general categories—those involving aid to church-related schools[12] and those involving aid to students attending those schools.[13] The appellants now acknowledge, as the court below explicitly held, that the Tennessee Student Assistance Program is a program of student—and not institutional—aid. Appellants refuse to acknowledge, however, that the constitutional test applied by this Court to student aid programs is more limited in scope than the test applied to institutional aid programs.

The Court has cautioned that the "tests" it has applied in prior Establishment Clause cases should not be rigidly and mechanically applied. "[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger, supra,* 421 U.S. at 359; see also *Tilton* v. *Richardson, supra,* 403 U.S. at 677-78.[14] The principal evils that the Establishment Clause was in-

[12] *E.g., Roemer* v. *Board of Public Works, supra; Tilton* v. *Richardson, supra; Lemon* v. *Kurtzman, supra.*

[13] E.g., *Board of Education* v. *Allen, supra; Everson* v. *Board of Education, supra.*

[14] *Cf. Wolman* v. *Walter, supra,* 45 U.S.L.W. at 4869-70 (opinion of Powell, J.).

tended to avert are "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). Government can avoid those evils only if it remains scrupulously neutral when its actions bring it in contact with religion or religious activities. Mr. Justice Blackmun stated that proposition most forcefully and succinctly in his opinion in *Roemer* v. *Board of Public Works, supra*: "Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity." 426 U.S. at 747. The test of constitutional validity evolved in this Court's student aid decisions assures that such programs will comply with that compelling command of neutrality.

That student aid programs are subject to a different analysis than institutional aid programs is illustrated by such decisions as *Everson* v. *Board of Education, supra; Board of Education* v. *Allen, supra,* and the textbook loan portions of the decisions in *Meek* v. *Pittenger, supra,* and *Wolman* v. *Walter, supra.*[15]

[15] Several factors that are integral to evaluating the constitutionality of institutional aid programs are irrelevant to the analysis of student aid programs. For example, the Court has ruled consistently that pervasively sectarian schools cannot participate in institutional aid programs. *E.g., Meek* v. *Pittenger, supra,* 421 U.S. at 362-66; *Levitt* v. *Committee for Public Education, supra; Lemon* v. *Kurtzman, supra.* Yet, in *Meek* v. *Pittenger, supra,* and *Wolman* v. *Walter, supra,* the Court approved the lending of textbooks to students who attend pervasively sectarian schools. Thus, in student aid programs, unlike institutional aid programs, the religious character of the schools is not a predominant consideration. *Cf. Roemer* v. *Board of Public Works, supra,* 426 U.S. at 766-67 (plurality opinion).

In addition, the entanglement branch of the three-part test applied to institutional aid programs appears to be of no concern in student aid programs. For example, after the Court concluded that the textbook loan program challenged in *Meek* had a valid primary effect, it did not examine whether excessive government entanglement with religion would result from that program. See 421 U.S. at 359-62.

Finally, as is discussed in more detail below, secular use restrictions, which are an essential feature of institutional aid programs, are unnecessary in student aid programs.

To be sure, the fact that the aid is channeled to students or their parents, rather than directly to church-related schools, does not automatically establish a program's constitutional validity. In *Committee for Public Education* v. *Nyquist, supra,* the Court noted that "the fact that aid is disbursed to parents rather than the schools is only one among many factors to be considered." 413 U.S. at 781. But as the Court's opinion in *Nyquist* makes clear, a true student aid program of the sort involved in this case is entirely consistent with the Establishment Clause.

In *Nyquist* the Court reviewed a program of tuition grants available only to parents of nonpublic school students, the vast majority of whom attended denominational, and particularly Roman Catholic, schools. 413 U.S. at 767-68. The Court invalidated that program because it considered the program to be, in reality, a program of aid to sectarian schools. "[I]t is precisely the function of New York's law," the Court concluded, "to provide assistance to private schools, the great majority of which are sectarian . . . . [T]he effect of that aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783.[16]

[16] Ohio attempted to cast a program of bus transportation to provide field trips for parochial school students as one of student aid. This Court ruled that effort was unavailing. "[T]he schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid." *Wolman* v. *Walter, supra,* 45 U.S.L.W. at 4867.

In reconciling its decision on the New York tuition grant program with the results in *Everson* and *Allen,* the Court in *Nyquist* noted that the benefits of the programs challenged in those earlier decisions were available to "*all* school children, those in public as well as those in private schools." 413 U.S. at 782, n.38. The *Nyquist* Court also cited with approval the decision in *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio), a decision which the Court had summarily affirmed. 409 U.S. 808 (1972). In striking down an Ohio tuition reimbursement program for nonpublic school students, the district court had emphasized not only that the benefits were available only to private school students but also that one religious group—Roman Catholics—predominated within that limited class of beneficiaries. 342 F. Supp. at 412."

These considerations prompted the Court to suggest strongly that the result in *Nyquist* would have been different if it were reviewing a student aid program under which the benefits were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution[s]" attended by the students. 413 U.S. at 782-83 n.38. Indeed, on the same day that *Nyquist* was decided, the Court dismissed for want of a substantial federal question an appeal challenging a South Carolina student aid program that had those precise characteristics. *Durham* v. *McLeod,* 192 S.E.2d 202 (1972), *appeal dismissed,* 413 U.S. 902 (1973).

The court below expressly ruled that the Tennessee Student Assistance Program has all of the characteris-

[17] The district court noted that 95 percent of the students who benefited from the Ohio program attended Catholic parochial schools. 342 F. Supp. at 403.

tics of a constitutionally valid student aid program. The secular objectives of the Program are undisputed and the effect of the Program has been scrupulously neutral in terms of advancing or impeding religion. "[T]he emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions." J.S. App., p. A-31. In fact, the district court found that, if there is any incentive in the challenged Program to select one type of college over another, the incentive is to select a public institution. *Id.* at n.5.

The district court correctly applied the controlling decisions of this Court in sustaining the constitutionality of the Tennessee Student Assistance Program, and further review of that ruling by this Court is not warranted.

C. Secular Use Restrictions

The appellants insist that an additional requirement must be satisfied for a student aid program to be constitutional. To pass constitutional muster, the appellants argue, a student aid program must "be restricted in such fashion as to guarantee that the State is supporting only the secular portions of the students' education." Juris. Stmt., p. 8; see also *id.* at pp. 12-13. This Court has, of course, ruled that use restrictions of the type described by the appellants are necessary components of institutional aid programs. *E.g., Hunt* v. *McNair, supra,* 413 U.S. at 744; *Tilton* v. *Richardson, supra,* 403 U.S. at 682-84. But no decision of this Court has required that student aid programs contain similar

restrictions. Appellants' argument to the contrary rests on a fundamental misconception of the Court's student aid decisions.

That misconception is most apparent in appellants' reliance on the *Nyquist* decision to support their use restriction argument. As noted above, the Court clearly perceived New York's tuition grant program as an institutional aid program when it asserted that "it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. . . . [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783. It was because of that perception that the Court noted the absence of any restrictions to confine the aid to the secular aspects of the sectarian schools that were the real beneficiaries of the contested aid. *Id.* Thus, the *Nyquist* decision provides no support for the appellants' argument that similar use restrictions are essential in true student aid programs.

Nor does appellants' use restriction argument find support in this Court's textbook loan decisions. *Wolman* v. *Walter, supra,* 45 U.S.L.W. at 4863; *Meek* v. *Pittenger, supra,* 421 U.S. at 359-62; *Board of Education* v. *Allen, supra.* It is true that the Court stressed in each of those decisions that only secular textbooks could be loaned to students attending church-related schools. But that aspect of those decisions does not support appellants' claim that use restrictions are essential to student aid programs. The Court's emphasis on the secular nature of the textbooks loaned is simply an acknowledgement that the Establishment Clause imposes an absolute bar to the state's providing religious texts to assist the educational process in either private

or public schools. *Cf. McCollum* v. *Board of Education,* 333 U.S. 203 (1948).

In terms of appellants' use restriction argument, what is significant about the textbook loan decisions is the absence of any concern about the *use* that students in sectarian schools would make of those books. The Court displayed indifference to the use of the textbooks in *Meek* even though the students receiving the books would be attending schools whose "very purpose . . . is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief." 421 U.S. at 366. Similarly, in *Wolman* the Court acknowledged that the students to whom textbooks were loaned attended schools in which it was impossible to "separat[e] the secular education function from the sectarian." 45 U.S.L.W. at 4866. The fact that textbooks provided by public funds could constitutionally be used in educational environments in which religion permeated secular instruction clearly suggests that use restrictions are not essential features of true student aid programs.

The lesson of the textbook aid cases is simply that the aid provided to students attending church-related schools must be secular in nature. That requirement was satisfied in *Wolman, Meek* and *Allen* when the state limited the textbooks it loaned to those that were secular in content. That requirement is also satisfied in this case. Here the state provides money to students to assist them in meeting their college costs, and there is certainly nothing religious or sectarian about money. Whether that money is used to attend a public or nonpublic, sectarian or nonsectarian, college is a matter of the student's choice, and the enabling Tennessee legis-

lation prohibits state officials from influencing that choice in any fashion. J.S. App., p. A-5.

Thus, under this Court's student aid decisions, the aid program challenged by the appellants meets the requirement that the aid provided be secular in nature. Those decisions do not require that a student's use of that aid be restricted,[18] and no such restrictions are necessary in the Tennessee Program.

D. Financing Religious Education

Appellants also argue that the Student Assistance Program violates the Establishment Clause because it assists students in obtaining a religious education. Juris. Stmt., pp. 11-22. That argument is based on faulty factual and legal assumptions.

Appellants initially base their argument on a very generalized observation by the court below that "some, but not all, of the private schools whose students benefited from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization." J.S. App., p. A-22. It is impossible to determine from that cryptic statement, which is the only reference in the opinion below to the fact that some private colleges in Tennessee are church-related, which institutions the district court had in mind. The appellants presented evidence about three church-related colleges, and six of the ten intervenors attend colleges that have varying degrees of religious orientations. The testimony of those six

[18] For example, there is no indication that the college student loan program upheld in *Durham* v. *McLeod, supra,* contained any use restriction.

intervenors established that their schools closely resembled those that this Court ruled were eligible for direct institutional aid in *Roemer* v. *Board of Public Works, supra,* and *Tilton* v. *Richardson, supra.* The record in this case is completely silent on whether any of the other 26 private colleges whose students benefited from the aid Program have religious affiliations of any degree.

More importantly, the district court's brief observation about certain unspecified colleges falls far short of holding those colleges provide an education that is religious in nature. That observation simply establishes that some unspecified colleges have certain religious characteristics. But that was also true of the colleges approved for direct institutional aid in the *Roemer* and *Tilton* decisions. Thus, something more is needed to support appellants' claim that the aid Program they challenge assists students in obtaining a religious education.

To overcome that factual deficiency, the appellants resort to the sweeping assertion that "[t]he record is replete with illustrations of the overwhelming sectarianism of . . . three colleges." Juris. Stmt., p. 13. They then refer in a highly selective manner to isolated pieces of evidence about one particular college. Appellants are obviously inviting this Court to conclude that students at that college, at least, receive a religious, rather than a secular, education.

Since the district court chose not to enter any findings concerning the religious characteristics of specific colleges, no useful purpose would be served at this stage of the proceedings to engage the appellants in a detailed debate over the sufficiency of the evidence they

cite to contend that students at the college they have isolated receive a religious education. It is sufficient to note that a review of all of the evidence presented concerning that college would refute that contention.

Even if it is assumed, *arguendo,* that some students receiving Student Assistance awards attend substantially religious colleges, that fact is of no relevance to the constitutional validity of a true student aid program. There was no question that the students receiving the textbook loans in *Wolman* v. *Walter, supra,* and *Meek* v. *Pittenger, supra,* were enrolled in pervasively sectarian parochial schools. But those student aid programs were approved nevertheless. Thus, the district court correctly sustained the constitutionality of the Student Assistance Program irrespective of the religious orientations of colleges attended by students receiving aid under that program.

E. Direct Aid To Sectarian Schools

Finally, and apparently in the alternative, the appellants contend that the Student Assistance Program impermissibly provides direct support to sectarian colleges. Juris. Stmt., pp. 22-26. The basis for that argument appears to be that, because some students attending church-related colleges may choose to pay tuition bills with their awards, the effect of the Program is to channel state funds into some colleges that could not qualify for institutional aid. That argument is as strained as it is frivolous.

There can be no serious dispute, as the district court repeatedly recognized, that the Student Assistance Program is a program of student—and not institutional—aid. It is students—not colleges—who must establish their eligibility for awards. It is students—not colleges—who apply for the awards. It is students—not colleges—who are paid the awards in their own names.

While some award recipients may decide to use part or all of their awards to pay their tuition, nothing in the enabling legislation or regulations governing the Program compels them to do so. Students are required only to use the awards for educationally related expenses. As the district court found, such expenses can and do include room rent, bus fare, clothing and health care. J.S. App., p. A-21. Indeed, the evidence presented to the district court showed that some students used their entire awards for educationally related expenses incurred elsewhere than at the colleges they attended.

Any benefits that a college might realize under the Student Assistance Program are indirect, incidental and haphazard. It is true, of course, that, to the extent that a Student Assistance award permits a person to attend a college he could not otherwise afford to attend, the college will benefit from the additional revenue it receives from that student. But this Court has definitively resolved the question of whether such indirect benefits realized by church-related institutions are impermissible under the Establishment Clause.

> "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." *Board of Education* v. *Allen, supra,* 392 U.S. at 244.

That holding in *Allen* is dispositive of appellants' "direct support" argument.

The district court succinctly summarized the purpose and effect of the Student Assistance Program when it stated:

> "In enacting the Tennessee Student Assistance Program, the Tennessee General Assembly sought to provide needy students with the opportunity to attend higher education institutions of their choice, be it public, private, sectarian, or nonsectarian. To ensure that the neutral purpose would not be compromised, the General Assembly enacted a student aid program rather than an institutional aid program." J.S. App., p. A-31.

That student aid program satisfies all of the constitutional criteria set forth in this Court's decisions, and the district court properly found the appellants' constitutional claims to be without merit.

CONCLUSION

For the foregoing reasons, the district court's disposition of appellants' Establishment Clause claim is in harmony with the controlling precedents of this Court, and no substantial question remains to justify plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted,

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